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RASMUSSEN & COMPANY, a
corporation,

Appellee,

v.

MARTIN MATHESON, doing business
as MATHESON REALTY COMPANY,

Appellant.

APPEAL FROM

CIRCUIT COURT

OF CHICAGO.

Opinion filed May 29, 1929

MR. JUSTICE JOSEPH W. MCGONAGLE delivered the opinion
of the court.

This action is brought by plaintiff for services rendered in auditing defendant's books and installing a bookkeeping system and other auditing work, for which defendant agreed to pay \$35 per day for seven hours work, and in accord with said agreement plaintiff rendered the service to defendant from December 22, 1927 to January 18, 1928, being within a fraction of ten days; that defendant promised to pay plaintiff \$350 for such service, which upon demand he refused to do. Defendant was duly served but failing to appear was defaulted and a judgment for \$350 rendered. Thereafter that judgment was, on motion of defendant, vacated upon payment of \$25 to plaintiff's attorney, and leave was given to defendant to file an affidavit of merits within ten days. Within that time defendant filed an affidavit of merits in which he claimed that he had a good defense to plaintiff's demand, and that he was advised that plaintiff corporation was engaged in the business of public accounting and held itself out to be such and as having in its employ certified public accountants to carry on its business; that on such representation plaintiff

was engaged to do certain auditing work on affiant's books of account for the purpose of detecting certain defalcations that defendant understood had been made by one of his employees, and plaintiff advised defendant that the work would take two days' time and at the maximum two and one half days, and that plaintiff's pay for such work would be \$35 a day, which defendant agreed to pay; that contrary to the agreement plaintiff caused the work to be undertaken by one of his employees who was not at the time a certified public accountant, and that said employee was incompetent and inefficient and consumed more time than was agreed upon between plaintiff and defendant; that the length of time consumed was due to the inexperience, incompetency and inefficiency of plaintiff's employee to do the work, over whom defendant had no control, and that he was not present during the time the work was done and had no means of knowing how much time the work was taking, and contrary to the agreement plaintiff sent a bill for \$350, and that such charge was unreasonable and exorbitant, which he refused to pay; that defendant is not indebted to plaintiff for said work in any amount in excess of \$75, which he is willing to pay in discharge of plaintiff's claim; that subsequent to the sending of the bill defendant sent plaintiff a check for \$150 with a notation that it was in full of the account; that the check was twice the amount that defendant thought was sufficient for the compensation of plaintiff; that plaintiff has retained the check and refused to return it to defendant, and defendant says that the obligation of himself to plaintiff is discharged by reason of the acceptance and retention of said check.

Plaintiff moved to strike said affidavit from the files for insufficiency, and the court after having heard the arguments of both parties ordered the affidavit of merits stricken

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from the files for insufficiency. Thereupon defendant, by his counsel, refused to file another affidavit of meritorious defense or to plead further and elected to stand on said affidavit. Thereupon the court found the issues for the plaintiff for \$350, and entered a judgment on the finding, from which this appeal is prosecuted.

A perusal of defendant's affidavit of meritorious defense discloses that no real legal defense is therein set up. All the averments are mere conclusions of the affiant and state no facts which would constitute, in law, a meritorious defense. Furthermore none of the matters set out are averred to be within his knowledge, but he averred that he was so advised without stating the source of his information or who advised him. In this condition of the record the averments of plaintiff's statement of claim remain unchallenged.

While the motion was to strike the statement of claim, in the Municipal Court the same rule applies to a motion to strike the affidavit of meritorious defense, where such affidavit does not state facts which in law constitute a defense to the action.

The sending of a check by a debtor to his creditor for a less amount than the claim on the ground that it is disputed, with a notation that it is in full of all demands, is not an acceptance by the creditor of the terms on which the check is sent, unless the creditor cashes the check. The check does not operate as a settlement until the check is accepted and the proceeds thereof collected. Until plaintiff realizes upon the check, the condition upon which the check was sent is not agreed to. The law on this subject is stated

in Lapp v. Smith, 183 Ill. 179, where quoting from McDaniels v. Bank, 29 Vt. 230, the court said;

" ' When a party makes an offer of a certain sum to settle a claim, when the sum in controversy is open and unliquidated, and he attaches to his offer the condition that the same, if taken at all, must be received in full satisfaction of the claim in dispute, and the party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction.' Ostrander v. Scott, 161 Ill. 339; Hayes v. Massachusetts Mutual Life Ins. Co. 125 id. 628".

It will be observed that in order to work an accord and satisfaction the party by receiving the money thereby indicates acceptance of the condition written in the check. That essential element is not present in this case.

The record discloses no error justifying the reversal of the judgment of the Municipal Court, and that judgment is therefore affirmed.

AFFIRMED.

ILSON AND RYNER, JJ. CONCUR.

33175

JOSEPH F. HADZAKA,

Appellant,

v.

JOHN F. ZIDLICKY and HENRY
GALIK,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 29, 1929

MR. PRESIDING JUSTICE HOLSON delivered the
opinion of the court.

This is an action on a promissory note given by defendants to plaintiff of date June 15, 1923, payable three months after date to the order of plaintiff, with interest at 6% per annum. The note, being for \$3500, was secured by chattel mortgage on property conveyed by plaintiff to defendants in a certain store which plaintiff had sold to defendants. It was admitted by plaintiff that \$1500 had been paid, as appears by endorsements upon the note, and defendants claim further that defendant Zidlicky has paid on account of said note in his own checks to plaintiff on June 19, 1923, 650; June 26, 1923, \$800, and July 28, 1923, \$550. While these payments were not denied plaintiff contended that the payments were made for other goods and merchandise sold by plaintiff to defendants on the several dates when said payments were made. It appears from the statement of claim that the chattel mortgage securing the note was foreclosed and that the net sum of \$453 was realized from the sale. The cause was tried before court and jury and a verdict for defendants was returned. Plaintiffs moved for a judgment non obstante verdicto, which was overruled, as well as a motion for a new trial, and thereupon judgment was entered upon the verdict of nisi capiat and for costs,

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from which judgment plaintiff prayed and perfected this appeal.

The principal controversy in this case arises on the facts developed by the evidence. It appears without contradiction that the defendants bought a business of plaintiff, in payment for which they gave the note in question. This fact is conceded by all the parties. A dispute arises regarding payments made thereon. It is admitted that \$1500 was paid. Neither is it denied but what the three payments June 19, 26 and July 28, 1923, of \$650, 800 and \$550, totalling \$2000, were made, but it is denied by plaintiff that those last three payments were made upon the note in suit, but were made for other goods sold by plaintiff to defendants. That really leaves as the nub of the controversy, which of these contentions is true.

The fact that these three payments totalled the balance due upon the note is in itself significant, for in ordinary business it would be a strange coincidence that such purchases totalled the amount due upon the note. This was the problem for solution by the jury. If the jury believed, as the evidence would warrant, that the payments were made upon the note, then the indebtedness upon the note had thereby been extinguished. It is another significant fact that plaintiff claims that the goods sold consisted of beer, which in the present condition of the law is contraband. That may have been viewed by the jury as a suspicious circumstance and regarded by them in a doubtful way. There is a clear and distinct discrepancy in the testimony of the contending parties. In such a condition the solution of the facts was the province of the jury. The opportunity of the jury to judge of the credibility of the witnesses, their interest or lack of interest in the case, their

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manner of testifying, their personal appearance upon the witness stand, enabled them to solve the question more readily than can this court from the cold print in the record. All those elements which are not before us were present before the jury, and from the testimony and the personal appearance and interest of the several parties the jury were better able to give faith and credit and to determine which of the witnesses were entitled to full credence, and also those whose testimony was not entitled to much, if any, weight. They had a right to believe the testimony of one side and to discredit the testimony of the other. This they evidently must have done, and as we find from defendants' evidence an abundance of facts sufficient to sustain the conclusion to which the jury arrived, we do not feel, under the law, that we have the right to disturb that verdict, or the judgment entered thereon. A reading of all the evidence and a due weighing thereof, inclines this court to the opinion that the defendants maintained their defense by competent evidence of probative force sufficient to overcome the case made by the evidence of the plaintiff. We therefore hold that the verdict and judgment are not contrary to the greater weight of the evidence.

We think it immaterial to pass upon the question as to whether the chattel mortgage was foreclosed or not. If it was plaintiff has been overpaid. If it was not the defendants have met their obligation to discharge the amount due upon the note by payment in money.

As held in Chapman v. Cary, 238 Ill. App. 605, the appellate court will not set aside a verdict of a jury unless it is manifestly against the weight of the evidence. And

as held in Green v. Ryan, 243 ibid. 466, if the weight of the evidence depends on the relative credibility of witnesses and the jury found for appellee, the appellate court cannot say that the verdict was against the weight of the evidence. As held in Grosch v. Mendota National Bank, 239 ibid. 515, where there is a conflict in the testimony, if the evidence of the successful party when considered by itself is sufficient to sustain the verdict, an appellate court will not set aside the judgment unless it is satisfied that it is manifestly against the weight of the evidence.

The instructions of the court to the jury were oral. We have examined them and conclude from such examination that every material legal point necessary to instruct the jury as to the law applicable to the case was sufficiently present in the instructions in which there is not any reversible error. In the state of the proofs plaintiff was not entitled to a judgment non obstante veredicto.

A careful study of the record fails to disclose any error of procedure or any other reversible error, and therefore the judgment of the Municipal Court is affirmed.

FINISHED.

WILSON AND RYNER, JJ., CONCUR.

33187

CHARLES A. SPAHR, JR.,

Appellee,

v.

LOUIS E. NELSON,

Appellant.

APPEAL FROM

SUPERIOR COURT

JOCK COUNTY.

Opinion filed May 29, 1939

MR. PRESIDING JUSTICE HOLDOM delivered the opinion
of the court.

This appeal is not defended.

The chronological sequence of events is as follows:

Plaintiff filed his praecipe in an assumpsit suit in the Superior Court on July 29, 1937, and a summons thereon was issued the same day, upon which service was had. On October 3, 1937, defendant entered his appearance by his present attorneys. The declaration was filed October 25, 1937. On October 31, 1937, defendant filed a plea of the general issue, supported by an affidavit of merits. When the case was called for trial June 14, 1938, defendant failing to appear by himself or his counsel, a jury was called and sworn to try the case, who heard the proofs and found the issues for the plaintiff, and assessed the plaintiff's damages at \$422.50, upon which judgment was entered. On the 19th day of September 1938, defendant made a motion supported by an affidavit of his attorney, to set aside and vacate the judgment, to have the execution quashed, and the cause placed upon the calendar for trial. The motion was made under Section 89 of the Practice Act, which superseded the old common law remedy of error coram nobis. This motion was denied on September 22, 1938. From this order defendant prosecutes this appeal.

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Defendant bases his contention that the order appealed from should be reversed on the ground that the judgment was entered through the omission of his attorneys to appear when the case was called for trial, and that such lack of attendance was an "excusable mistake". Matters cognizable under section 89 of the Practice Act rest in mistake of fact of the court, which lead to the entry of the judgment sought to be set aside. Such fact could only be supported by some memorandum or monument within the possession and control of the presiding judge, which would show that such judgment was entered through a mistake of fact or by the misprision of the clerk. Nothing of that kind appears in this case. The proceedings were regular, the judgment was rendered in due course, and the term at which it was entered elapsed before the motion to vacate was made. Therefore the court was without jurisdiction to disturb the judgment. All the matters argued for reversal would be proper to be considered on appeal or writ of error. Among these contentions of defendant are that the failure to appear and defend was an excusable mistake; that some of the names of the jurors signed to the verdict are different from those impanelled to try the case; that the judgment is for a greater amount than claimed in the affidavit of claim, because the affidavit of claim does not mention interest, and the judgment includes interest, and that there was no similiter filed to the plea of the general issue. Such matters are not reviewable under section 89, supra, but if they have any merit would be cognizable on writ of error, as the time for appeal has long since elapsed. It was not necessary for the plaintiff to answer the affidavit of defendant setting forth the

the reasons on which the motion was based because nothing in the motion or the affidavit entitled defendant to relief under section 89, supra. The averments of the affidavit stood as confessed, none of the averments having been denied, and therefore it was the duty of the court to hold, as we presume it did, that the facts alleged in the affidavit were insufficient to support the motion, and as we assume the court found, as it should that none of the matters set forth in the affidavit presented a case for relief under section 89, supra.

None of the cases cited by defendant involve an appeal from an order denying relief under section 89, supra. People v. Crooks, 326 Ill. 466, was a writ of error in a criminal case; Stare v. Vayda, 234 Ill. App. 309, was an appeal, as was Rouse, Hazard & Co. v. Niley, 149 *ibid.* 439. These cases all involved the judgment and errors of procedure which led to the judgment.

The order of the Superior Court denying defendant's motion to vacate the judgment, etc. was without error. That judgment is therefore affirmed.

AFFIRMED.

WILSON AND WYNER, JJ. CONCUR.

33393

ALEAGRA PEYTON,
(Plaintiff) Appellee,

v.

METROPOLITAN LIFE INSURANCE
COMPANY, a corporation,

(Defendant) Appellant.

25 MAY 1938

UNIONIST COURT
OF CHICAGO.

Opinion filed May 29, 1938

MR. PRESIDING JUSTICE HOLCOM delivered the opinion
of the court.

The statement of claim sets forth that plaintiff's
action, is upon a life insurance policy upon the life of
Captain Ralph Peyton with the defendant insurance company, in
which plaintiff is named as beneficiary; that the payments of
premiums were made and due proof of death furnished to defendant;
that there is due \$1000 with interest from the date of the
death of the insured.

To this statement of claim defendant interposed on
November 4, 1936, an affidavit of merits. The affiant in the
affidavit of merits swears that in the policy sued on the
company agreed that in consideration of the application for the
policy, copy of which is attached thereto and made a part thereof,
and the payment of the one-half annual premium of \$25.60 upon
the 13th day of April and October until twenty full years'
premiums have been paid or until the prior death of the insured,
promised to pay, etc.; that the premium was not paid according
to the terms of the contract sued upon; that by virtue of the
fact that the premiums were not paid the policy was cancelled
and void according to its terms and not in force at the time



of the death of the insured; that it lapsed for non-payment of premium on April 19, 1932, prior to the death of the insured and was not reinstated and in force at the time of his death; denies that defendant is indebted to the plaintiff in the sum of \$1000 or any other amount.

There was a trial before court and jury with a resulting verdict in favor of plaintiff and against defendant for the sum of \$1332.43, upon which the court entered a judgment, after overruling defendant's motions for a new trial and in arrest of judgment, and defendant brings the record to this court by appeal.

Defendant argues for reversal that contracts of insurance are governed by the same principles of law as other contracts; that the payment of premiums is a condition precedent to liability on the policy, and that where the policy has lapsed for non-payment of the premium it cannot be reinstated without complying with the conditions of the policy.

These questions of law are not disputed by plaintiff. Plaintiff admits that the payment of premiums is a condition precedent to liability on the policy. The questions before us are questions of fact which have been decided contrary to defendant's contention in favor of plaintiff, and that, inferentially at least, by their verdict the jury decided that the policy was in full force at the time of the death of the insured. Defendant contends that the premium upon the policy, which became due April 19, 1932, was not paid, and plaintiff on the contrary contends that it was paid, and that such premium was paid by the delivery by plaintiff to James Dockery, an agent of the defendant, of certain individual policies on the lives

of the children of plaintiff for their cash surrender value, to be applied in payment of the premium on the policy in suit prior to April 19, 1932, which was prior to the expiration of the grace period. Defendant denied that James Dockery was its agent at the time, but its own evidence shows that he was such agent both prior to April 19, 1932 and again in June thereafter. This fact was submitted to the jury who by their verdict found that he was such agent. Both plaintiff and her daughter, Captollar Huff, so testified, as also did another daughter, Elenora Peyton, and it is not denied that plaintiff turned such policies over to Dockery at the time, upon his advice that "the grace period was about to be exhausted," which period did not expire until May 20, 1932. These policies had a cash surrender value exceeding the amount requisite to pay the premium due April 19, 1932. A further premium of \$25.60, due October 19, 1932, was paid on August 25, 1932 to Nathaniel T. Osterman, admittedly the agent for such purpose of defendant, the insured dying on December 14, 1932, while the policy was in full force and effect as the result of the payment to Osterman of the premium due October 19, 1932 on August 25, 1932. Defendant contended that that premium was refunded, which was denied by plaintiff, and the jury by their verdict sustained plaintiff's contention. If there was any such tender, it was made after the death of the insured by a check payable to the insured, which check was not introduced in evidence. The defendant does not deny the payment in August to Osterman, its agent, of the premium of \$25.60, or that it was not sufficient to keep the policy in life to the time of the death of the insured.

On the trial defendant refused to deposit the premium paid of \$25.60 with the clerk of the court so that the defendant

kept that premium.

The contention of defendant is that the policy lapsed for non-payment of premiums. The jury's verdict, however, decided this contention against defendant.

It was the duty of the jury in weighing the evidence to pass upon the credibility of the witnesses and the probative force of their testimony and to determine which side had the preponderance of the evidence. As it appears that the evidence of plaintiff is sufficient to sustain the verdict, we are not warranted in disturbing it.

Defendant complains of the second instruction, which was to the effect that defendant was obligated to pay if all the premiums were paid, and that such instruction was calculated to mislead the jury. We find no merit in this contention, as that was the question before the jury as to whether all the premiums had been paid, so that the policy was in life at the time of the insured's death. As defendant in its brief says "the case turns mainly on the evidence, there can be little or no question as to the law".

Plaintiff asks for an affirmance with statutory damages on the theory that this appeal is prosecuted for delay. In the condition of the evidence, which was in sharp conflict, we would not be justified in so doing. Plaintiff filed an additional abstract and asks that the cost thereof be taxed as costs in the cause. As there was so little of pertinent matter in defendant's abstract, we regard the additional abstract as quite superfluous.

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

WILSON AND RYNER, JJ., CONCUR.

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WILLIAM B. AUSTIN,

Appellant,

v.

GRACE DOROTHY ERNSTROM, et al.,

Appellee,

APPEAL FROM

U. S. DISTRICT COURT,

COOK COUNTY.

On APPEAL OF WILLIAM B. AUSTIN,
RESPONDENT-APPELLANT VS. JOHN
A. ROGLUND, APPELLEE.

Opinion filed May 29, 1929

MR. JUSTICE RYNER delivered the opinion of the court.

The complainant was the holder of a promissory note in the principal sum of \$8,300.00, secured by a junior trust deed upon property located at seventy-eighth street and Cornell Avenue in the City of Chicago. There was a prior incumbrance upon the premises, securing an issue of bonds of the aggregate face value of \$45,000.00.

On November 23, 1925 the complainant filed a foreclosure bill in the Superior Court of Cook County alleging that there was due him the sum of \$7,500.00 on the principal note and in addition the amount of moneys paid to the holder of the bonds secured by the first mortgage, together with interest, solicitor's fees, expenses and costs.

The cause was referred to a master in chancery. His report was approved by the court and a decree of foreclosure was entered on April 21, 1926. On May 11, 1926 Justin T. McCarthy was appointed receiver. He gave bond with the complainant as surety. May 12, 1926 the receiver, pursuant to the prayer of a petition filed by the complainant, was authorized by order of

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court to pay the general taxes for the year 1925 and, until the expiration of the period of redemption, to pay in monthly installments one-twelfth of the annual interest and one-twelfth of the principal maturing upon the bonds secured by the first mortgage. The order recited that it was entered pursuant to the express provisions of the trust deed.

On May 13, 1926, the receiver paid out on account of the bonds secured by the first mortgage the sum of \$437.66. The next day the premises were sold under the decree of foreclosure. The complainant was the purchaser. Three days later the receiver paid the general taxes for the year 1925, amounting to \$705.20.

On May 31, 1926, the court entered a decree confirming the master's report of sale. The decree contained a finding that there was a deficiency of \$1,311.78 and ordered McCarthy to continue to act as receiver for the full statutory period of redemption. He was given authority to lease, collect the rents and to exercise the powers previously granted.

On September 29, 1927, John A. Hoglund filed in court a petition alleging that on October 8, 1926, he acquired all of the interest of the owners of the premises foreclosed; that McCarthy never acted as receiver but that the office was usurped by the complainant who was his employer at the time of his appointment and that the petitioner was entitled to the rents, issues and profits after payment of the deficiency decree for \$1,311.78. The prayer of the petition was that McCarthy and the complainant be required to answer and that, upon a hearing, each be ordered to account for moneys received and disbursements made.

The complainant, Austin, answered the petition, alleging that McCarthy as receiver made all collections of rents and disbursements; that the owners of the equity of redemption suggested the appointment of McCarthy as receiver knowing that he was in the employ of the complainant; that the suggestion was made because McCarthy had been collecting the rents for the complainant and could conduct the receivership in an economical manner; that all disbursements were made by checks made out by McCarthy and signed by the complainant; that on July 24, 1926 McCarthy left the employment of the complainant but delegated to employees of the complainant the authority to make necessary collections and disbursements in connection with the receivership.

McCarthy also filed an answer. He admitted that at the time of his appointment he was in the employ of the complainant. He also alleged that he never collected any rents or made any disbursements but that all matters relating to the receivership were attended to by the complainant.

On November 15, 1927, the complainant and McCarthy filed their joint account showing receipts totalling the sum of \$10,540.00 and disbursements amounting to \$10,758.69. Upon objections being interposed to the account, each filed a supplemental account. In his supplemental account McCarthy stated that for the period from May 13 to July 24 in the year 1926 he personally attended to the making of the collections and disbursements; that he caused a receivership account in his name to be opened in the books of the complainant; that from July 24, 1926 until August 20, 1927 collections were made by employees of the complainant and that disbursements were made by checks signed by the complainant and charged to the account of McCarthy. The supplemental account of the complainant was substantially the same as that of McCarthy.

Objections to the joint account, as supplemented, were filed and a hearing was had in open court. McCarthy testified that he was a clerk in the complainant's office when he was appointed receiver; that, while for a short period of time he occasionally visited the tenants and collected the rents, he retained none of the moneys collected and made no disbursements; that he kept no records of receipts and disbursements; that from July 24, 1926, to August 30, 1927, he had nothing to do with receivership matters and that he signed the accounts because counsel for the complainant had promised him indemnity in the event of any shortage in the accounts.

Delta I. Jarrett testified that he was one of the solicitors for the complainant and that McCarthy was appointed as receiver by consent of all parties in interest at the time of the appointment and upon the request of the solicitor representing the then owner of the property. He further testified that it was agreed that the complainant should become surety upon the receiver's bond for the purpose of saving expense.

The complainant testified that he had nothing to do with the receivership; that he intrusted everything to McCarthy but did not trust him after he proved to be dishonest and left the employment of complainant; that he had all moneys coming into the receivership deposited in his name pursuant to a rule of his office; that after McCarthy left all disbursements were made by Miss Normond, an employee of the complainant; and that he (the complainant) had nothing to say about the disbursements but performed the mere ministerial act of signing checks presented to him by Miss Normond.

Miss Normond testified that she was an employee of the complainant; that after McCarthy left complainant's office

the necessary expenditures were made under her direction; that there were no expenditures except for "the janitor, electric light bill and the coal, and of course the decorating;" that McCarthy left no directions and made no inquiries, and it was simply a case of someone else attending to the matter; and that when McCarthy was appointed as receiver "he did not start a separate account for the receivership" but "it was just put in Mr. Austin's general account."

Father E. Hobrnick took the stand and stated that she was book-keeper and cashier for the complainant. Her testimony was substantially the same as that of Miss Normond, except that, after McCarthy left the office, the receivership affairs were attended to under her direction, with the assistance of Miss Normond.

The court found that the complainant "William B. Austin procured the entry of the order of this court entered on May 31, 1926, continuing the appointment of Justin T. McCarthy as receiver for the full statutory period of redemption, without giving notice of the application to enter said order to any of the defendants in this cause, and without disclosing to the court that the said William B. Austin was himself acting as receiver, and the relations then existing between the said Austin and said McCarthy." The finding is fully warranted by the evidence.

The decree also contains further findings as follows:

"The court further finds that the following items of disbursement shown on said account are improper disbursements and not rightly chargeable against said rent collections, and are hereby disallowed:

1926		
June 10.	Baer-Eisendrath	441.67
Aug. 2	Baer-Eisendrath, prepayment	441.87

Aug. 5.	Baer-Eisendrath, July prepayment . . .	\$441.67
Sept. 1	Baer-Eisendrath, prepayment	441.67
Oct. 1	Baer-Eisendrath	441.67
1927		
Jan. 21	Baer-Eisendrath	497.67
Mar. 18	Baer-Eisendrath	427.08
Apr. 6	Baer-Eisendrath, January prepayment . .	427.08

1927

Aug. 27/	Of the item of \$1393.88 for deficiency decree and interest there is disallowed the sum of	82.10
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		<u>\$3642.28</u>
	Brought forward	3642.28
John W. Ellis, attorney for receiver		500.00
1927		
July 16.	Joseph Krenn, decorating	263.00
Dec. 29.	Joseph Krenn, a/c decorating	120.00
June 4.	J. Krenn	374.25
July 7.	J. Krenn, decorating	273.25
Aug. 27	J. Krenn	200.00
Aug. 27	J. Krenn, decorating	108.75

Total	<u>\$5381.53</u>
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The court further finds that the total disbursements claimed in said account amount to the sum of \$10,758.69, but that only disbursements other than those hereinabove disallowed, and which in all amount to the sum of \$5,377.16, are proper deductions from said total receipts of \$10,540.

The court further finds that the disbursements shown on said account as made on May 13, 1926, Baer-Eisendrath prepayment \$497.66 and May 17, 1926, Carr, 1926 general taxes \$705.20, were made by the said William H. Austin prior to the time that said Justin T. McCarthy had made any collections whatever of rents from said premises, but that said disbursements totaling \$1,202.86 should be allowed as proper disbursements from said receipts of rents."

Presumably the court allowed the two items mentioned in the last finding because they were paid pursuant to an order of court entered prior to the date of the foreclosure sale and upon proper notice.

Disbursements totaling in amount the sum of \$4,172.86 were not objected to by Heglund. He took the position that although these expenditures had been wrongfully made, they had inured to the benefit of himself as the holder of the equity of redemption.

The complainant collected the rents from July 30, 1925 until the date of the appointment of the receiver, pursuant to an assignment from the owner of the premises. When, however, he induced the court to appoint a receiver, he forfeited all right to further collect or disburse moneys. McCarthy became an officer of the court and should have ceased to act as the agent of the complainant in respect to the management of the particular property. But this course was not pursued.

For a period of about two months, after his appointment as receiver, McCarthy occasionally collected rents but all moneys received went into the complainant's personal account. During the remainder of the statutory period allowed for redemption, the complainant, without the knowledge of the court, performed all of the duties pertaining to the receivership. Despite the fact that he was the purchaser at the sale, he paid out, during the redemption period approximately \$10,000.00 of receivership moneys, for decorating, payments on account of principal and interest on the first mortgage bonds and similar items..

The complainant never advised the court that McCarthy had abandoned the office of receiver until he was required to answer the petition of Hoglund. He then induced McCarthy to join in a false accounting by a promise of indemnity. By accounting he submitted himself to the jurisdiction of the court to be summarily dealt with as though he was in fact the court's receiver. The chancellor was fully warranted in sustaining the objections to the account and in ordering the complainant to pay to the clerk of the court the sum of \$5,529.61 with interest from the date of the entry of the order.

The first part of the report deals with the general situation of the country. It is a very interesting and informative study of the country's development. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's development.

The second part of the report deals with the economic situation of the country. It is a very interesting and informative study of the country's economic development. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's economic development.

The third part of the report deals with the social situation of the country. It is a very interesting and informative study of the country's social development. The author has done a great deal of research and has gathered a wealth of material. The report is well written and is a valuable contribution to the study of the country's social development.

The complainant suffered no injury as the result of the court's ruling. The payment of the deficiency decree was approved. After this decree was satisfied the rents, issues and profits, collected during the period of redemption belonged to the owner of the equity of redemption. This is true, notwithstanding provisions in the trust deed to the contrary. Schaeppi v. Bartholomae, 217 Ill. 105.

For the foregoing reasons the decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

HOLDOM, P.J. AND WILSON, J. CONCUR.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the transparency and accountability of the organization.

2. The second part outlines the specific procedures for recording transactions. It details the steps involved in the accounting process, from the initial entry to the final reconciliation.

3. The third part addresses the role of the accounting department in ensuring compliance with relevant laws and regulations. It highlights the need for regular audits and the importance of staying up-to-date with changes in the regulatory environment.

4. The fourth part discusses the impact of technology on accounting practices. It explores how modern accounting software can streamline processes and reduce the risk of errors.

5. The fifth part provides a summary of the key points discussed in the document and offers recommendations for further improvement.

33083

THE ENGINEERING AGENCY, INC.,

(Plaintiff) Appellee,

v.

ROBERT H. FORD, Jr.,

Defendant,

On Appeal of
THE PACIFIC MUTUAL LIFE INSURANCE
COMPANY OF CALIFORNIA, a corporation,
Garnishee,

Appellant.

APPEAL FROM

SUPREME COURT

OF ILLINOIS.

Opinion filed May 29, 1929

MR. JUSTICE RYDER delivered the opinion of
the court.

The plaintiff, on January 12, 1928, obtained a judgment by confession for \$120.00 against the defendant, Robert H. Ford. The judgment not being satisfied, after the return of an execution, a garnishment summons was, on January 19, 1928, served on the Pacific Mutual Life Insurance Company of California. The company filed its answer as garnishee, on April 11, 1928, in which it denied that it was indebted to Ford or had any property belonging to him. The answers to interrogatories were to the same effect.

The court found in favor of the plaintiff and entered judgment against the garnishee for the full amount of the judgment against Ford.

The facts disclosed that Ford was employed by the Pacific Mutual Life Insurance Company of California as an agent, on a commission basis, to solicit life and health

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insurance business. It is undisputed that, commencing with February 3 and ending with April 4, 1938, the company paid to him small sums of money, at irregular intervals, and varying in amounts from \$5.00 to \$30.00. In connection with each payment a receipt was taken reciting that it was made "as an advance which is to be repaid out of future commissions or on demand."

Ford was charged with interest on the books of the company. He earned no commissions during the period in question. The assistant manager of the company testified that Ford was employed on a straight commission basis and that he told him that he "would help him along until he got started, by loans, that were to be paid back to the company."

The foregoing constitute all of the pertinent facts relating to the issue involved in this appeal. It is so apparent that the payments in question were loans and not on account of wages, that it is deemed unnecessary to cite authorities in support of our conclusion that the trial court erred in entering judgment against the garnishee.

The judgment of the Municipal Court of Chicago appealed from is reversed and judgment entered here in favor of the garnishee, Pacific Mutual Life Insurance Company of California.

REVERSED AND JUDGMENT HERE.

HOLDOM, P.J. AND -ILSON, J. CONCUR.

25-1.A. 614³

33092

AUDREY LANE,

Appellee,

v.

JOHN TUTTLES and WILLIAM
KAPLAN,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

Opinion filed May 29, 1923

MR. JUSTICE RYNER delivered the opinion of the court.

The plaintiff conducted a portrait studio in premises in the City of Chicago for the use of which she paid rent to the defendants. Immediately below the floor occupied by her was a basement containing the necessary equipment for furnishing heat and hot water for the tenants. The heating plant consisted of a low-pressure Kewaunee boiler. The hot water heater was connected with the chimney by means of an iron flue of standard gauge.

On the morning of May 10, 1923, a fire occurred in the basement. It burned a hole about three feet in diameter through the ceiling and destroyed property belonging to the plaintiff which the jury found to be of the value of \$1,004.00. The court gave her judgment for this amount.

The only evidence of the origin and cause of the fire was the testimony of the then janitor of the building, Herbert Clay Hogan. He testified that the fire started over the stovepipe leading from the hot water heater to the chimney; that the stovepipe or flue was within a few inches of the ceiling; that the flue was not covered; that at some prior time he had advised one of the landlords that it was too close to

the ceiling and should be covered; that on the morning in question he "had to fire extra heavy" in order to give the tenants the hot water they needed; that he put in plenty of coal; and that after starting the fire in the heater he went to another building half a block away when he was notified by another janitor that smoke was coming out of the building in question. On direct examination he said that the ceiling was covered with lath and plaster. On cross-examination he stated that he thought that the laths were of metal composition.

A lieutenant of the fire department of the City of Chicago testified that the flue in question was four feet long, ten inches in diameter, "and four inches from the wood lath and plaster ceiling."

C. W. Lampe, an architect, testified that he saw the ceiling when it was being constructed and that it was composed of metal lath and three coats of gypsum plaster.

The defendant, Tutules, said that he had measured the distance between the flue and the ceiling and that it was nine inches. He denied that the janitor ever told him that the flue was too close to the ceiling and should be covered. The defendant, Kaplan, made the same denial.

The declaration consisted of four counts. The first three counts charged negligence. The fourth charged the defendants with having violated a city ordinance governing the installation of "low-pressure boilers," defined as boilers in which the steam pressure did not exceed ten pounds, and "high-pressure boilers," defined as boilers in which the steam pressure exceeded ten pounds. The ordinance was admitted in evidence

1. 凡在本市范围内从事生产、经营活动的单位和个人，均须依法纳税。

2. 纳税人应当按照规定的期限和地点缴纳税款。

3. 税务机关有权依法对纳税人的纳税情况进行检查。

4. 纳税人应当如实提供纳税资料，不得隐瞒或弄虚作假。

5. 违反税法规定的，将依法予以处罚，构成犯罪的，依法追究刑事责任。

6. 税务机关应当依法保护纳税人的合法权益。

7. 本办法自发布之日起施行。

8. 本办法由税务机关负责解释。

9. 附则

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over objection.

Counsel for the defendants offered to show by the testimony of competent witnesses the difference between a steam boiler and a hot water heater and in particular that the latter is not a steam generating device and not rated according to steam pounds. Objection to this line of testimony was sustained. The trial judge first gave as his reason for so ruling that if the ordinance was clear it spoke for itself. "moment later he remarked:

"It was not a hot water heater, according to the testimony in this case."

Finally a colloquy took place between court and counsel as follows:

"Mr. Levinson: I asked him only about the hot water heater. I am going over to the steam boiler.

Objected to.

The Court: I think I will have to sustain that objection. The only fire there was occurred from this particular thing that the janitor called a Kewaunee boiler, with a flue leading into the chimney.

Mr. Levinson: I want to show, your Honor, that there was at least eighteen inches of space between the basement and the main steam heating boiler.

The Court: I don't know anything about the main steam heating boiler and don't care anything about it."

Hogan, the janitor, and Lampe the architect had just testified that the Kewaunee boiler supplied the steam heat and that the heater furnished the hot water for the building.

There was not an iota of evidence to show that the heating plant was constructed or maintained in violation of any of the provisions of the ordinance in question. No contention is made that the hot water heater came within the provisions of the ordinance. The court refused to instruct the jury, at the

instance of the defendants, that the ordinance had no application.

The record is devoid of evidence showing any defects in any of the equipment in the basement. True the janitor testified that the flue leading from the hot water heater to the chimney was within a few inches of the floor above and that at some time he told one or both of the defendants that it was too close to the ceiling and should be covered, but no witness testified that the proximity of the flue to the ceiling was likely to cause a conflagration.

The only evidence to support any of the charges of negligence contained in the first three counts of the declaration was the testimony of the janitor. He testified he put in plenty of coal and started an extra heavy fire in the heater and that the hole burned in the ceiling was directly over the flue or stovepipe attached to the heater. The jury were left to speculate whether the fire was caused by the flue becoming overheated or by the act of someone not under the control of the defendants, or as the result of spontaneous combustion.

It was for the jury, and not the court, to determine what the proof disclosed. The rulings of the trial court as to the applicability of the ordinance to the facts and his statements during the course of the trial and in the presence of the jury as to what the facts established were erroneous and highly prejudicial to the rights of the defendants. These errors are of such a character as to require a reversal of the judgment.

In view of the foregoing conclusion it becomes unnecessary to consider other points discussed in the briefs. It may not be amiss, however, to comment upon the point made that the abstract filed fails to comply with the rules of this court.

We are unable to determine from an examination of the abstract itself that it is subject to this criticism. The proper method to be pursued by a litigant, who questions the sufficiency of the abstract prepared by his adversary, where the alleged imperfections do not appear upon the face of the abstract, is to comply with Rule 18 of this court, by filing an additional abstract, and not by asking the reviewing court to examine numerous pages of the record. "Rule 18 reads in part, as follows:

"The abstract must be sufficient to present fully every error and exception relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision unless the opposite party shall file a further abstract, making necessary corrections or additions, which he may do if he deems it necessary to a full understanding of the merits of the cause."

In conclusion, a landlord is not an insurer. He is liable only for acts of negligence. If a tenant sustains injury to his person or property because of defects in the portion of the premises under the control of the landlord of which the latter has or should have knowledge then the right of the tenant to be compensated for his loss is established. In the instant case the evidence of negligence on the part of the defendants was so meager that the jury may well have been induced to render the verdict it did by the erroneous rulings and statements of the trial judge above recited.

The judgment of the Superior Court of Cook County is accordingly reversed and the cause remanded.

REVERSED AND REMANDED.

HOLDON, B. J. AND WILSON, J. CONCUR.

1. The first part of the report deals with the general situation of the country and the progress of the work during the year. It is a summary of the work done by the various departments and a statement of the results achieved. It is a general statement of the work done by the various departments and a statement of the results achieved.

2. The second part of the report deals with the work done by the various departments during the year. It is a detailed statement of the work done by the various departments and a statement of the results achieved. It is a detailed statement of the work done by the various departments and a statement of the results achieved.

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33179

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

CHRIST LAMBOS,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 29, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff in error, Christ Lambos, was arrested charged with being the keeper of a common ill-governed house, located at 334 East 115th street, Chicago, in violation of Section 16^{1/2}, Chapter 38 Smith & Murd's Revised Statutes and was found guilty by the court of being the keeper of a house of ill fame or prostitution. Nicholas Pappas and Arnell Brown were, at the same time, charged with being the inmates of a house of ill fame. The three defendants, Lambos, Pappas and Brown were tried together and each perfected their appeal to this court and the causes were consolidated here.

From the evidence it appears that the defendant, Lambos, owned the hotel in question and had been in business, operating said hotel, for 15 years. There is no testimony in the record concerning the defendant Lambos, other than this one fact. The testimony shows that the defendant, Pappas, was a clerk employed in the hotel. There is no evidence in the record concerning this defendant, or his conduct, other than this fact. The complaining witness, Grady, testified that he talked to some person by the name of Gantz in the hotel who told him that he was there to see a girl and the witness Grady then asked him if he had given the girl money and he said he had - that he had given her \$5.00 - and had had sexual intercourse with her and that the price was \$3.00 and that the girl in his

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presence handed back to Gantz, two one dollar bills. This witness testified further that the girl stated in the presence of Lambos that she split with the house. He testified further on cross-examination that he did not know Gantz, never saw him before and did not know where he was. This witness testified further that he did not examine the register of the hotel to see whether or not the parties were registered.

The court in its analysis of the facts stated that there was not sufficient evidence to justify a conviction, but permitted the witness Grady, who was a police officer, to make a further investigation and the officer later made his report to the court largely based on what some one had told him. This report amounted to nothing other than that he was unable to ascertain from others that the defendant, Brown, had lived at a certain address which he stated she had given him prior to the arrest. This was all hearsay and inadmissible.

There is no proof in the record that the house in question was a house of ill fame, other than the evidence already referred to. There is no testimony that anything ever occurred in said hotel except this isolated incident. The evidence in support of that incident is of such an unsatisfactory character that a conviction should not be predicated upon it. There is no testimony as to the character of the house in question and, so far as the record discloses, it was a hotel and operated as such.

We do not feel that the testimony is sufficient to sustain the judgment of conviction.

For the reasons stated in this opinion the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

HOLDOM, P.J. AND RYNER, J. CONCUR.

33180

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

NICHOLAS PAPPAS,

Plaintiff in Error.

APPEAL TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 29, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

This cause comes before this court on a writ of error to the Municipal Court of Chicago, and was considered and consolidated with Case No. 33179, People of the State of Illinois, Defendant in Error, v. Christ Lambos, Plaintiff in Error, and for the reasons stated in that opinion the judgment of the Municipal Court finding the defendant herein guilty, is reversed.

JUDGMENT REVERSED.

HOLCOMB, F.J. AND RYNEK, J. CONCUR.

33181

THE PEOPLE OF THE STATE OF ILLINOIS

Defendant in Error,

v.

ARABELL BROWN,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 28, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

This cause comes before this court on a writ of error to the Municipal Court of Chicago, and was considered and consolidated with Case No. 33179, People of the State of Illinois, Defendant in Error, v. Christ Lambos, plaintiff in Error, and for the reasons stated in that opinion the judgment of the Municipal Court finding the defendant herein guilty, is reversed.

JUDGMENT REVERSED.

HOLDOM, P.J. AND DYKE, J. CONCUR.

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33193

FRED G. SCHWEIZER,

Appellee,

v.

W. F. SEIDEL and G. A.
SEIDEL, Doing business
as Ad. Seidel and Sons,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 29, 1939

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff Fred Schweizer, filed his action in assumpsit alleging that the defendants, W. F. Seidel and G. A. Seidel, doing business as Ad. Seidel and Sons, were indebted to the plaintiff in the sum of \$1,542.02, together with interest thereon from April 10, 1938, for money due the plaintiff for labor performed and services rendered, and upon an account stated between the parties April 10, 1938.

From the facts it appears that the plaintiff had been employed by the defendants from November 1932, until April 10, 1938, and in support of his claim introduced in evidence 42 exhibits, the same being statements of account rendered at various times during the course of his employment. Under the arrangement between the parties, plaintiff prepared and manufactured certain food products and the defendant provided the necessary funds, furnished the factory and marketed the product. The plaintiff was to be compensated on a basis of a division of the profits. Prior to December 1934, the plaintiff had a drawing account of \$400 a month.

Objection was made to the introduction in evidence

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of the statements, but they appear to have been rendered regularly in the course of business between the parties, and payments made based thereon. The correctness of the amount is not disputed. We believe the statements were properly admissible in evidence, particularly in view of the fact that, over a long course of dealings the parties had considered them as the basis of settlement between them. The particular objection appears to be to the final statement of April 10, 1938.

Defendant admits that it owed plaintiff the item of \$409.34, for commissions on shipments from April 1, to April 9, 1938. Objection is made to the item of \$776.96, for commissions on merchandise on hand April 10, 1938. Seidel, one of the defendants, testified that the company did not have any record of the stock on hand in charge of the plaintiff except as shown by plaintiff's record. The record or statement rendered April 10, shows the value of the stock on hand to be \$776.96. There was evidence upon which the trial court would have found this item in favor of the plaintiff. There appears to be some confusion as to the item of \$400.00. This confusion arises by reason of the fact that in December, 1934, there appears to have been a changed arrangement between the parties, as a result of which plaintiff was no longer credited with a drawing account, but was only entitled to a percentage of the profits. Under the arrangement prior to that time, plaintiff was drawing \$400 a month on account and the question for consideration was whether or not, at the time this was discontinued, he was entitled to a month's credit, or any part thereof.

The trial court after having heard the evidence found that he was entitled to \$300, as set out in his statement of

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April 10th, and disallowed the additional \$300 claimed in the statement of claim filed in the cause. The trial court heard the evidence and was in a better position to see and observe the witnesses and decide these questions than would a court of review. The cause was tried before the court without a jury and the presumption is that the finding of the trial court was based on only material evidence. Every intendment should be in favor of the validity of the judgment. We see no reason for disturbing the finding and judgment of the trial court.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HOLDON, F.J. AND WYNER J. CONCUR.

33218

HOLLANDER EXPRESS & VAN CO.,
a Corporation,

Appellee,

v.

SAM SIMON Impleaded with
Edward Simon,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 29, 1929

MR. JUSTICE WILSON delivered the opinion of the court.

This was a suit upon a contract brought by Hollander Express & Van Co., a corporation, against Sam Simon and Edward Simon, jointly. A trial was had with a jury, resulting in a verdict in favor of the plaintiff and against the defendant, Sam Simon, upon which verdict judgment was entered, a motion for a new trial entered and denied and a motion in arrest of judgment entered and denied and exception by the defendant.

Upon the trial of the cause the defendant, Edward Simon, failed to appear and the cause was taken as confessed and a default entered against him. From the record it does not appear that he was ever dismissed out of the proceeding nor does there appear to be any judgment entered against him.

It is urged as a ground for reversal that in an action ex contractu against two or more persons jointly, where all are served with process and they remain parties throughout the action, the judgment must be against all or none.

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This assignment of error is well taken. The proper course was to assess damages against both defendants and render a joint judgment as to them. In a proceeding ex contractu where there is more than one defendant, there should be but one judgment and it should be against all defendants or a proper motion should be made dismissing certain defendants out of the proceeding, amending the pleadings and proceeding as to those remaining. Vansten v. Boughton, 71 Ill. App. 627; Doyte v. Fellows, 209 Ill. App. 325; Umlauf v. Chacamas Trop. Prod. Co., et al., 209 Ill. App. 291.

For the reasons stated in this opinion the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HOLDON, P.J. AND H. WEBB, J. CONCUR.

33287

PRICE REALTY SECURITIES CO.,

Plaintiff-Appellant,

v.

JULIUS BENKE,

Defendant-Appellee.

260-1155
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed May 29, 1939

MR. JUSTICE WILSON delivered the opinion of the court.

The plaintiff, Price Realty Securities Co., a corporation, filed its complaint in the Municipal Court, charging that at the request of the defendant, Julius Benke, it undertook to and did procure a loan on certain real estate located at 7050 South Eggleston avenue, Chicago, Illinois, but that the defendant had refused to pay the commission for the procurement of said loan, although requested to do so. Defendant in his affidavit of merits denies that the plaintiff is a duly licensed real estate broker; denies that he listed the property described, but charges that the plaintiff agreed to make a loan on two pieces of property belonging to the defendant, as a whole, and not a separate agreement as to each of the two pieces; denies generally that he employed or authorized the plaintiff to find a person or persons to make a loan on the property and denies that the plaintiff did procure anybody willing to make the loan.

The jury found the issues in favor of the defendant and against the plaintiff. Motion for a new trial by the plaintiff was overruled and judgment entered on the verdict.

Plaintiff, to sustain the issues on its behalf, introduced in evidence a written agreement dated July 22, 1926, signed by the defendant. It authorized plaintiff to negotiate a loan for the sum of \$12,000 on the property in question, located at 7050 South Eggleston avenue; it contained the telephone numbers of the defendant, both at his place of business and at his home; it contained a provision that the defendant was to pay a 4% commission. The agreement was accepted by the plaintiff July 30, 1926.

J. B. Crook, a witness for plaintiff, testified that he was connected with the Price Realty Securities Co. and that he talked with the defendant in July 1926, and saw him sign the application and that he then took the application to Mr. Murwith, Vice President of the Company.

Howard Kenneth Murwith, a witness on behalf of the plaintiff, testified that he was the Vice President of the plaintiff company and that he procured a person by the name of Shafer, who agreed to make the loan and that he took him out to show him the building. This witness testified further that he had a talk with Mr. Benke shortly after July 30, 1926, over the telephone and told him that the loan had been accepted, and that the defendant asked him to hold off for a while. This witness testified further that he had another talk with Benke about a week after and told him he should come in and sign the papers as the investors sometimes backed out if they did not receive the loan and that Benke then told him he would sign the notes and trust deeds in a few days. This witness testified further that the attorney for the defendant called upon him in November with reference to the loan, and that there was some talk with reference to a settlement of the claim for commission.

1. The first part of the report deals with the general situation of the country. It mentions the fact that the country is a developing one and that it has a large population. It also mentions that the country has a long history and a rich culture. The second part of the report deals with the economic situation of the country. It mentions that the country has a large agricultural sector and that it is a major exporter of agricultural products. It also mentions that the country has a growing industrial sector and that it is a major importer of industrial goods. The third part of the report deals with the social situation of the country. It mentions that the country has a high literacy rate and that it has a growing middle class. It also mentions that the country has a high unemployment rate and that it has a large informal sector. The fourth part of the report deals with the political situation of the country. It mentions that the country has a democratic government and that it has a long history of political stability. It also mentions that the country has a growing civil society and that it has a strong tradition of human rights.

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There was no objection to this last statement of the witness, and, as a matter of fact, it is clearly deducible from the cross-examination that counsel did call upon Hurwith.

Marcella Murphy, a witness on behalf of the plaintiff, testified that she was employed by the plaintiff and stated that she wrote a letter to the defendant and mailed it and that plaintiff's exhibit 4, was a carbon copy of the original and was a correct copy. Plaintiff's exhibit 4, introduced in evidence, being a letter of September 13, 1926, stated that the plaintiff would accept the \$12,000 loan on the building located at 7050 Eggleston avenue and requested the defendant to let them know what he intended to do in the matter. Plaintiff's Exhibit "4" bears date September 1, 1926, but this is evidently a clerical error as it is repeatedly referred to as the letter of September 12, 1926.

Edward Shafer, a witness on behalf of plaintiff, testified that he was an investor and that he examined the property at 7050 Eggleston avenue and was ready, on July 30, 1926, to make a loan of \$12,000 on the property, with interest at 6%. He testified further that he was able to do so and had the cash on deposit in the bank.

The defendant Benke himself was the only witness to take the stand to sustain the issues for the defendant. He stated that he had a talk with the witness Crook and told him that he needed a loan in a short time; that it had to be a joint loan and that he would not pay 6 and that Crook then said, "All right make it four per cent." He testified further that he had two contracts with the plaintiff, one for a loan on the property in question and another contract for a loan on a different piece of property; that they were two separate

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and distinct contracts. He denied that he had any talk over the telephone with Hurwith, and denied that he received the letter, plaintiff's exhibit 4. He admitted that he subsequently made a loan with the Capitol Mortgage Company on the property in question and paid 3% commission. He testified further that he had never been notified by anyone that the loan had been accepted under the Price Realty Securities Company's contract.

It is difficult to understand why defendant, who was anxious to procure a loan in a short time and had signed a written agreement to that effect, would not, himself, have undertaken to have made inquiries as to whether or not the loan had been procured. There is also in the record the positive evidence of Hurwith that he telephoned him that the loan was ready and there is also the evidence of the girl employed in the offices of the plaintiff that she mailed the letter to him. The evidence to the effect that a person had been procured who was able and willing to make the loan, is uncontradicted.

In the face of this testimony on behalf of the plaintiff, it becomes necessary to examine the record carefully for the purpose of ascertaining whether or not there was such error in the record as would account for the verdict of the jury. It is insisted on behalf of the plaintiff that the weight of the testimony is overwhelmingly in favor of the plaintiff. It is also insisted as a ground for reversal that the verdict was the result of remarks and statements of counsel for the defendant, wholly outside of the case and not justified by the evidence, and calculated to prejudice the jury.

In the course of the examination of the witness Brock, counsel for the defendant said to the witness: "Go ahead. You

have nothing to conceal, have you?" This remark was stricken out by the court. Counsel for the plaintiff when asking the witness a question was interrupted by counsel for the defendant with the remark, "Don't coach your witness." As examination of the record shows this remark was uncalled for.

In his argument to the jury, counsel for the defendant ridiculed the witness Crook by stating that he had the right name; that he was crooked and that he probably would get his rake-off out of the commission. He practically accused Crook of bringing the girl who mailed the letter into court for the purpose of swearing to a lie. He repeatedly stated throughout his argument that the witness Hurwith lied and this was uncalled for and prejudicial.

The Supreme Court of this State in the case of Bishop v. Chicago Junction Ry. Co., 189 Ill. 63, in its opinion, says:

"The rule in this State must be regarded as settled that misconduct of counsel of the character mentioned is sufficient cause for reversing a judgment unless it can be seen that it did not result in injury to the defeated party. The questions to be determined are, therefore, whether the improper argument was of such a character as was likely to prejudice the defendant, and if so, was the verdict so clearly right that a new trial ought not to be granted because of such prejudicial argument."

We cannot say from the evidence in this case that the verdict was so clearly right that a new trial ought not to be granted because of such arguments. The fact is that the evidence is of such a character that a new trial should be granted if the remarks of counsel and references to witnesses were, in the opinion of this court, intended to divert the minds of the jurors from the real question at issue.

1. The first part of the report is a general
introduction to the subject of the study.
It discusses the importance of the study and
the objectives of the research.

2. The second part of the report is a
review of the literature. It discusses the
work of other researchers in the field and
how it relates to the current study.

3. The third part of the report is the
methodology. It describes the methods used
to collect and analyze the data.

4. The fourth part of the report is the
results. It presents the findings of the study
and discusses their implications.

5. The fifth part of the report is the
conclusion. It summarizes the main findings
of the study and provides recommendations for
future research.

The court again in its opinion, in Bishop v. Chicago Junction Ry. Co., supra, said:

"While it is true that at times, in closely contested cases, counsel may inadvertently say that which is prejudicial, the influence of such a statement may generally be overcome by sustaining objections thereto and by retraction on the part of offending counsel made in good faith, yet where it would appear, as it does here by frequent instances, that counsel has in the presence of the jury indulged in acts and statements prejudicial to the rights of the opposite party, and which tend to indicate that he was seeking what might be gained from such prejudice of the jury, such misconduct will amount to a mis-trial of the cause, unless it can be seen that it did not result in injury to the plaintiff in error. We cannot so hold here. The evidence was conflicting and the verdict returned was for a large sum. While it is unfortunate that this case must be reversed for these reasons, yet it is a misfortune visited upon defendant in error by his own attorney. When intelligent counsel persists in conduct which he knows may result in setting aside the verdict of the jury if he secure one, he is thereby deliberately taking chances with his client's rights."

To the same effect see Appel v. Chicago City Ry. Co., 359 Ill. 561; Chicago & Alton R. R. Co. v. Scott, 232 Ill. 419. In our opinion remarks of counsel for defendant both during the trial and on the argument were uncalled for and prejudicial to a fair trial and consequently error.

Defendant has not seen fit to follow this appeal, and we have not been aided in the consideration of the cause by briefs or argument on behalf of the defendant.

For the reasons stated in this opinion the judgment of the Municipal Court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HOLDOM, P.J. AND RYNER, J. CONCUR.

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BLUE ISLAND FIRST SECURITIES
COMPANY, a corporation, et al.,
Complainants and Appellees,

v.

EDWARD J. PATTERSON et al.,
Defendants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

On appeal of FRANCIS J. SULLIVAN,
one of the defendants,
Appellant.

MR. PRESIDING JUSTICE GRILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Francis J. Sullivan from a foreclosure decree of the circuit court of Cook county, entered September 24, 1928, amended October 9, 1928, based on a trust deed executed by Edward J. Patterson in his lifetime conveying certain land in said county, given to secure his four notes aggregating \$64,000, all dated June 7, 1926, due five years after date and bearing six per cent interest per annum (payable semi-annually) before maturity, and seven per cent after maturity. On the face of each note is the provision that, "if default be made in the payment of any one of the installments of interest, * * then at the election of the legal holder hereof, the principal of this note together with the accrued interest thereon, shall at once become due and payable * *, said election to be made at any time after such default without notice or demand." In the trust deed are provisions that, in the event of a breach of any of the covenants or agreements, the whole of the indebtedness, including principal and all earned interest shall at the option of said legal

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holder, without notice, become immediately due and payable, with interest thereon from the time of such breach at seven per cent per annum, and that all expenses incurred in connection with the foreclosure, including reasonable solicitors' fees, stenographer's charges and other incidental costs, shall be paid by the grantor.

The original bill was filed on August 11, 1927. The Blue Island First Securities Company was then the legal owner and holder of the notes, and the trustee named in the deed, John L. Bacharias, Jr., was made a co-complainant with it. Patterson was made the sole defendant, - complainants probably believing that he was still living. After describing the notes and mentioning certain provisions of the trust deed (copies being attached to the bill as exhibits), complainants alleged that "none of said principal notes, totalling \$64,000, has been paid; that the interest has been paid on all of said principal notes to the 7th day of December, 1926." They did not specifically allege that the interest due on the notes on June 7, 1927, had not been paid, nor that the legal holder of the notes (the Securities Co.) had elected to declare the entire principal indebtedness to be due and payable.

On February 7, 1928, complainants were given leave to file a supplemental bill and the court ordered that summons issue as prayed for therein. Complainants alleged that since the filing of the original bill, to-wit, on November 9, 1927, Virginia Patterson, claiming to be a sister of Edward J. Patterson, entered her appearance and suggested the death of Edward (which occurred on November 22, 1926) and stated that prior to his death the premises in question had been conveyed to Francis J. Sullivan. And complainants further alleged that the estate of said Patterson had not been probated and that his heirs-at-law or devisees were unknown to them. They prayed that

Sullivan, Virginia Patterson, the unknown heirs-at-law and unknown devisees of said Patterson, and the unknown owners, be made parties defendant and make answer, etc. On May 15, 1928, Sullivan filed his answer, denying all material allegations of the original bill, but alleging that he is the owner in fee of the premises and that the trust deed is not a lien thereon. Upon reference to a master, a hearing was had, and on July 27, 1928, he filed a report in which, after making numerous findings, he concluded that the material allegations of the bill and supplement thereof were sustained by the evidence and recommended that a decree be entered, etc. He found inter alia that it had been stipulated that a reasonable fee for complainants' solicitors was \$2,300; that complainants were entitled to stenographer's charges of \$5.50; that there was due to them the total sum of \$73,398.83; that this amount was made up of the face of the notes, \$64,000, interest thereon from December 7, 1926, to July 7, 1928 at 7% per annum, \$7,093.33, and said solicitor's fees of \$2,300 and stenographer's charges of \$5.50; that said Patterson died on November 22, 1926; that prior to his death, by quit claim deed dated June 15, 1926, he conveyed all his interest in the premises to Sullivan, who on that day entered into possession and has, by his tenants, remained in possession ever since; that said quit claim deed was not recorded until May 26, 1928; and that one Albert Jaros is now in the actual possession of the premises, as a tenant of Sullivan, and has no other right, title or interest therein. Sullivan testified before the master that "Albert Jaros lives on the 120 acres and is there merely as a tenant. His lease expires some time next year (1929). He occupies the premises on a monthly rental. No one else occupies the property." After a hearing before the court on Sullivan's exceptions the decree appealed from was

entered. It is in the usual form, and the findings are in substantial accord with those of the master. One of the findings is that "by reason of the default in the payment of the interest installment falling due on June 7, 1927, the said Securities Company elected to declare the entire indebtedness due and payable and thereafter brought proceedings to foreclose the trust deed." Another finding is that "said premises are now in the actual possession of Albert Jares, a tenant of Sullivan, and that he has no interest except as such tenant." It is adjudged that there is due to the Securities Company the total sum of \$73,398.83, besides costs and expenses of the proceeding, in which are master's fees, allowed at the sum of \$107.50.

Defendant's counsel here urges a reversal of the decree. One of the contentions is that the bill as supplemented does not sufficiently support the decree, in that it does not specifically allege the non-payment of interest due on June 7, 1927, or that because of such non-payment the Securities Co., as legal holder of the notes, had elected to declare the entire indebtedness to be due and payable. There is no merit in the contention. The bill alleged that none of the principal notes had been paid and that interest thereon had been paid to December 7, 1926. We think that these allegations are sufficient to support the finding of the decree, following that of the master and substantiated by proof, that interest on the notes (which had accrued before the filing of the bill on August 11, 1927) had not been paid. And it was not necessary for complainants formally to allege that the Securities Co., because of the non-payment of the semi-annual interest accruing on June 7, 1927, had elected to declare the entire indebtedness to be due and payable. The principal notes on their face and the trust

deed provided that such an election might be made "without notice." And the filing of the bill was a sufficient election and declaration to that effect. (Heffron v. Gage, 149 Ill. 182, 190; Brown v. McKay, 151 id. 318, 324; Sweeney v. Kaufmann, 166 id. 233, 234; Holdraff v. Lemlee, 105 Ill. App. 671, 673.) In the case last cited it is said: "The trust deed, as we have seen, provides that the legal holder of the indebtedness may, at his option and without notice, declare the principal note due and payable for a breach of any of its conditions. One of its conditions was to pay the said interest note at its maturity, which was not done. The filing of the bill was a sufficient declaration of his option to declare the principal note due, and no formal declaration to that effect was necessary."

Another contention is, it appearing from the decree and the evidence that one Jaros was in possession of the premises in question as a tenant of Sullivan, that Jaros was a necessary party and, he not having been made a party, the decree of foreclosure must be reversed. In our opinion this contention is also without merit. Sullivan testified that Jaros' tenancy "expires some time next year" (1929). It may have expired by this time. The witness Cavanaugh testified that "Jaros pays Sullivan \$25 a month as rent for the premises." Defendant in the trial court did not raise the point of Jaros' non-joinder as a party by demurrer, plea or answer, or in his objections or exceptions to the master's report. In Perse v. Chicago Drayon Co., 235 Ill. 391, 395, it is said: "When the objection of non-joinder of a party is not taken by demurrer, plea or answer it will receive little favor from the courts, and to be of avail it must appear that the decree will have the effect of depriving the party omitted of his legal rights." As to Jaros it does not here so appear. (See, also, Chicago, etc. R. Co. v. National Elevator Co.,

153 Ill. 70, 88; State National Bank v. U. . Life Ins. Co., 238 id. 148, 158-9; Gulick v. Hamilton, 287 id. 367, 373-2.) In the case last cited it is said: "If the interest of an omitted party in the subject matter of a suit and the relief sought is so bound up with that of the other parties that his presence is an absolute necessity the court will reverse the decree, not on account of the defendant who makes the objection for the first time on appeal but because no effective decree can be made. That rule only applies where the interest is a present substantial one and where a decree will result in depriving the omitted party of some material right without a hearing."

Defendant's counsel's further contention is that the amount of the decree is excessive by the sum of \$320. That it is excessive in the computation of interest is admitted by complainants' counsel and they have consented in their briefs here filed and upon oral argument that a remititur may be made in said amount of \$320. This may properly here be done. (Mulcahey v. Strauss, 52 Ill. App. 252, 255; affirmed in 151 Ill. 70, 84; Cass v. McKirgan, 243 Ill. App. 163, 169.)

For the reasons indicated the decree of the circuit court of September 24, 1928, as amended, will be affirmed for \$73,978.83 (\$73,398.83 less \$320) as of that date. The costs in this court will be taxed against the appellant, Sullivan.

AFFIRMED ON REMITTITUR OF \$320.

Scanlan and Barnes, JJ., concur.

33220

EVA E. WOOD,
Appellee,

vs.

MIKE DRAGASH,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On February 26, 1927, plaintiff, the mother in law of defendant, commenced a 4th class action in contract against him in the municipal court of Chicago to recover back certain moneys claimed to have been loaned to him on two occasions, - \$800 on October 31, 1922, and \$100 on August 21, 1925. She demanded interest at the legal rate. Her claim, including interest, was in excess of \$1,000, but if sustained the recovery would be limited to \$1,000, because of the particular action. She also sued out an attachment in aid, and under the writ the bailiff on February 28, 1927, levied upon certain improved real estate, owned by defendant and known as 8122 South Park Avenue, Chicago. Two grounds for the attachment are stated in plaintiff's affidavit, viz., that he "has within two years last past fraudulently concealed or disposed of his property so as to hinder and delay his creditors," and that "he is about fraudulently to conceal, assign or otherwise dispose of his property or effects" for the same purpose. Defendant entered a general appearance and filed an affidavit of merits, denying that plaintiff at the times stated or at any time had loaned ^{him} money, or that he was indebted to her in any sum. He did not, however, file any traverse of the attachment. There was a trial before the court without a jury on May 26, 1927, resulting in a finding and judgment in plaintiff's favor for \$1,000. The court also sustained the attachment. Defendant perfected an appeal from the judgment to this appellate

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court, and on January 30, 1928, the first division thereof, for certain procedural errors upon the trial (as appears from the unpublished opinion), reversed the judgment and remanded the cause. (247 Ill. App. 630.)

After the cause had been reinstated in the municipal court, defendant was given leave to file a traverse of the attachment and did so on July 10, 1928. He categorically denied the two grounds, above mentioned, and prayed that the attachment be quashed.

On September 5, 1928, upon a second trial without a jury, and after both parties had introduced evidence, the court sustained the attachment, and, on the issue as to defendant's indebtedness as claimed, entered a finding in plaintiff's favor for \$1,000. Judgment was entered against defendant for this amount, and the court ordered, in addition to a general execution, that "special execution issue therefor against the property attached." The present appeal followed.

On the issue whether plaintiff at the times stated loaned to defendant \$800 and \$100, respectively, the testimony is conflicting. Defendant by his counsel here contends that the court's finding on this issue is manifestly against the weight of the evidence. We have carefully reviewed the evidence and cannot agree with the contention. No useful purpose will be served in here outlining the conflicting testimony. Suffices it to say that we think it appears by a clear preponderance thereof that the loans, aggregating \$900, were made to defendant at the times stated and that he never paid back the money to plaintiff, although often requested to do.

Defendant by his counsel also contends that the court committed prejudicial error in rulings as to the admission and rejection of certain evidence. If any errors were committed in these particulars they are not such as require a reversal of the judgment.

But we are of the opinion that plaintiff's evidence was wholly insufficient to warrant the court in sustaining the attachment and in ordering a special execution. Plaintiff made no attempt to prove the first ground of attachment, and, as to the second, plaintiff's evidence had no tendency to show that he was "about fraudulently to conceal, assign or otherwise dispose of" any of his property so as to hinder and delay her as a creditor, or any other of his creditors if such he had.

Accordingly, the judgment for \$1,000 against defendant is affirmed, but that portion of the judgment order, wherein the court sustained the attachment and ordered that a special execution issue against the property attached, is reversed, and the cause is remanded to the municipal court with directions to quash the attachment and to eliminate from the judgment order the award of said special execution.

AFFIRMED IN PART AND REVERSED IN PART
AND REMANDED WITH DIRECTIONS.

Scanlan and Barnes, JJ., concur.

HARRIS B. GREENBERG,
Appellant,

vs.

MARTIN A. HOWELL,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 25, 1928, in the municipal court of Chicago, plaintiff caused a judgment by confession for \$843.15 to be entered against defendant on six of his promissory, judgment notes for \$125 each, payable to his own order and by him endorsed and also endorsed by Joseph Lino and E. B. Lino, all dated July 8, 1927, respectively due in 6, 7, 8, 9, 10 and 11 months after date and drawing interest from date at the rate of six per cent. The amount of the judgment is made up of the principal sum, \$750; accrued interest, \$43.15; and \$50 as reasonable attorney's fees. Execution was issued on the judgment and returned unsatisfied on September 13, 1928, and subsequently the Chatelaine Tower Building Corporation, of which defendant is president, was summoned as garnishee. On October 10, 1928, defendant presented his verified petition that the judgment be opened and that he be given leave to appear, file a jury demand and make his defense, - the judgment in the meantime to stand as security. At the hearing on the same day, plaintiff's motions to dismiss the petition for "lack of jurisdiction" and for "insufficiency" were denied and the prayer of the petition was granted. From this order plaintiff was allowed and perfected the present appeal. Defendant here asks that the order be affirmed. He has not moved that the appeal be dismissed.

We are of the opinion that the appeal must be dismissed upon this court's own motion. The order is not a final one as the action awaits the final judgment of the trial court. (J. Svenson

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& Sons v. Adelson, 232 Ill. App. 461, 462; Dean v. Gerlach, 34 id. 233, 234; East Buggy Co. v. Litchfield Implement Co., 55 id. 99, 102; H. J. Andrews & Co. v. Anchor Mfg. Co., 210 id. 536, 637.)

We may, however, say that after examining the allegations of defendant's verified petition, which prima facie disclose a good defense to his claimed liability on the notes, and after considering the provisions of section 21 of the Municipal Court Act, we think that the court had jurisdiction to open the confessed judgment and allow defendant to present his defense, and also that, in so doing, the court was not guilty of any abuse of discretion. (305, Schmalhausen v. Zukowski, 183 Ill. App. 307; Tyner v. Real Institutes Co., 185 id. 551, 553; Hirsch v. Home Appliances, 242 id. 418, 422). In the Schmalhausen case it is said:

"The contention that the municipal court has no jurisdiction to set aside such a judgment (one by confession) on a motion made more than thirty days thereafter is untenable, if a sufficient petition supports such motion showing equitable grounds for the setting aside of the judgment. The statute itself is expressly against plaintiff in error's contention. An application to open up or to set aside a confessed judgment to permit a defense to the action is in any case addressed to the equitable as well as the legal powers of the court, and if the petition supported by affidavit shows that the applicant has a legal defense, or one that is triable by a jury, the court should grant it unless the applicant has been guilty of laches in filing his petition."

And we do not think that it appears in the present case that defendant was guilty of such laches as would bar his right to make a defense to the notes.

For the reasons above stated the present appeal is dismissed.

APPEAL DISMISSED.

Scanlan and Barnes, JJ., concur.

33241

THEODORE KIRCHEN and GROVER F.
KIRCHEN, doing business as
Kirchen Brothers,
Defendants in Error.

v.

KATHRYN GLEASON, administratrix
of the estate of T. T. GLEASON,
deceased,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant, as administratrix, etc., seeks to reverse a judgment of the Municipal court of Chicago, entered after verdict in a first class action in assumpsit, October 3, 1928, against her in her representative capacity, for \$2297.47, "to be paid in due course of administration." At the close of all the evidence the court instructed the jury "to find the issues in favor of the plaintiffs," and also

"That the plaintiffs are entitled to recover as damages the reasonable and fair difference between the rental provided by the lease at 222-224 West Madison street and the fair and reasonable market value of the rental of the new premises which the plaintiffs may have been compelled to acquire upon being evicted, to the extent of what the plaintiffs paid or became liable for, if any, from the time of vacating the old premises until the expiration of the lease between the plaintiffs and T. T. Gleason, and all reasonable and necessary expense incurred by the plaintiffs which was the direct consequence of the eviction of the plaintiffs."

And the court gave to the jury the following form of verdict: "We, the jury, find the issues against the defendant and assess the plaintiffs' damages in the sum of \$_____. The jury returned such form with the blank filled in with the figures "\$2297.47," and the same became their verdict.

One of the grounds for a reversal of the judgment, as

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here urged by defendant's counsel, is that under the pleadings and the evidence the question, whether plaintiffs were evicted from said premises, was for the jury and not the court to determine, and that the court erred in giving said instructions.

The salient facts are in substance as follows: On May 19, 1919, William F. Adams, the then owner of the land and building, known as 222-224 West Madison street, Chicago, demised by written lease to F. C. Gleason the fifth floor of the building, to be occupied for the manufacture and sale of caps, regalia and kindred lines, for the period from August 1, 1919, to April 30, 1929, at a monthly rental of \$200. Among the provisions was one to the effect that the lessee (Gleason) would not sub-let the premises or any part thereof, or assign the lease, without first obtaining the written consent of the lessor (Adams). Shortly thereafter, as appears from an endorsement upon the lease, Gleason assigned all his right, title and interest therein to Abraham Lewis, David Becker and Louis Latin, for the period beginning August 1, 1919, and ending April 30, 1922, and, in consideration of the written consent of the lessor to said assignment, Gleason guaranteed said assignees' performance of the covenants of the lease for said period. On March 12, 1920, Adams, by written lease, demised the land and the entire building to the Haverford Cycle Co., a corporation, for the period of 15 years, commencing May 1, 1920, and ending April 30, 1935, (unless sooner terminated as provided) for a certain agreed rental. This lease was made subject to several existing leases of various portions of the building, including, as specified therein, said lease to Gleason of the fifth floor, as assigned to Lewis, Becker and Latin. After Lewis, Becker and Latin's right to occupy the fifth floor had expired, Gleason, under date of May 10, 1921, executed a lease to Kirchen Brothers (plaintiffs herein), wherein he "demised and leased" to them said

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fifth floor, "to be occupied for the manufacture and sale of paper goods," for the period from July 1, 1922, to July 31, 1926, at a monthly rental of \$225. It does not appear that Gleason ever obtained the written consent of either Adams or the Haverford Co. to sublet said fifth floor to Kirchen Brothers, or to make said lease to them. On July 7, 1923, while Kirchen Brothers were in possession the Haverford Co. filed a complaint in forcible detainer against them, and also Gleason, claiming that all were unlawfully withholding the possession thereof from it. Kirchen Brothers appeared and demanded a jury trial. While the suit was pending Gleason died on August 18, 1923, and on August 22, 1923, Kathryn Gleason (defendant herein) was appointed administratrix of his estate by the probate court of Cook county. Subsequently, in said forcible detainer suit, Gleason's death was suggested and, Kathryn Gleason's appearance as administratrix having been entered, a jury trial was commenced, during which, on September 19, 1923, on motion of the Haverford Co., the suit was dismissed as to said administratrix, and the cause proceeded against the two Kirchen Brothers as defendants. At the conclusion of the evidence the court instructed the jury to return a verdict finding that they were guilty of unlawfully withholding the possession of the premises from the Haverford Co., and the jury returned such verdict. On September 28, 1923, judgment for possession of said fifth floor was entered in favor of Haverford Co., and again Kirchen Brothers. From the draft judgment order of the court it appears that the writ of restitution was "stayed until April 30, 1924, and the rental value of the premises fixed at \$3,500, from May 1, 1923, to April 30, 1924, - the receipt of which sum is acknowledged by plaintiff" (Haverford Co.) Grover Kirchen, one of the plaintiffs herein, testified that after the entry of said judgment plaintiffs continued to occupy said fifth floor until the

latter part of April, 1924, when they vacated the same and moved their effects and business to new premises, viz., the 2nd floor of No. 221 West Randolph street, Chicago. The lease (introduced in evidence) that plaintiffs signed for their new premises was from April 15, 1924, until April 30, 1929, and for a rental of \$250 a month, beginning May 1, 1924, - being an increase of \$25 a month over what they formerly had been paying. At the time the judgment order of September 23, 1923, was entered, section 17a of the Forcible Entry and Detainer Act, as amended June 27, 1923, (Laws Ill., 1923, p. 407), was in force. The section, as amended provided in part that, "in any case under paragraph 4 of section 2 of this Act, in which the plaintiff is entitled to judgment and execution for possession of property used for residence purposes within the corporate limit of cities, towns or villages, a stay of execution not exceeding six months from the expiration of the term or tenancy may, upon application of the defendant, be granted in the discretion of the court, " *;" that "no stay shall be granted unless the applicant therefor shall pay all rent then due and shall also pay all rent which may accrue until the end of the calendar month in which the stay is granted;" that "no bond shall be required in case the applicant for the stay shall pay the rent then due, and shall also pay the entire amount which may be determined by the court as reasonable rent for the whole period of such stay;" that "the term 'rent' for the purposes of this section shall be deemed to include all compensation for use and occupation, and the amount of such compensation shall be fixed at the rate for which the defendant was liable, as rent for the month immediately prior to the expiration of his term or tenancy, plus such additional amount, if any, as the court may determine to be reasonable;" and that "this section shall cease to be in effect July 1, 1925." It is to be noticed that the section only applied in the year 1923 to property, "used for residence

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purposes," whereas it appears the said fifth floor in question then was used for business purposes. It is further to be noticed that the municipal court on September 28, 1923, stayed the issuance of a writ of restitution for a period longer than six months. Therefore, the presumption will not be made that the court, in staying said writ until April 30, 1924, and in fixing the rental of the fifth floor to be paid by Kirchen Brothers to the Haverford Co., up to April 30, 1924, did so under and by virtue of the provisions of section 17a of said Act. We think that on the contrary a jury might properly infer that an arrangement was entered into (embodied in the judgment) between Kirchen Brothers and the Haverford Co., whereby the former were not to be evicted from said fifth floor, but were to be allowed to remain in possession until April 30, 1924.

Plaintiffs commenced the present action on July 15, 1924, and filed a statement of claim. This was about 2-1/2 months after they had vacated said fifth floor, and within one year after defendant had been appointed administratrix of said estate. On October 6, 1927, plaintiffs filed an amended statement of claim, in which, after setting forth the making of the lease by Gleason to them of the fifth floor of said building on May 10, 1922, and for the period from July 1, 1922, until July 30, 1926, their taking possession and paying to Gleason rent thereunder, the dates of the death of Gleason and the appointment of defendant as administratrix, they alleged in substance that, by the terms of the Gleason lease to them, Gleason "demised and leased" said fifth floor and thereby covenanted that he "had good right and title to make said lease * * and that they would have the quiet and peaceful enjoyment and possession of the premises;" that Gleason breached these covenants "by permitting plaintiffs (Kirchen Brothers) to be disturbed in said quit and peaceful enjoyment and possession;" that he "permitted the Haverford Company to interfere therewith, in that * * said Haverford Company instituted said forcible detainer

suit * * against plaintiffs;" that the same was determined and judgment rendered in favor of the Haverford Company; that thereby they "were forced to and did vacate said premises on April 30, 1924; and that "the eviction of plaintiffs herein * * constituted and was a breach of the covenants contained in said lease and implied by the laws of the State of Illinois." As to plaintiffs' damages, they claimed the total sum of \$4030.02, made up of "additional rental under new lease \$2600," various itemized expenses incurred by removal to their new location, aggregating \$494.56, and attorney's fees and expenses incurred in defending said forcible detainer suit, \$935.46. This claim for damages is clearly excessive as to the additional rental. When their suit was commenced on July 15, 1924, said additional rental paid would have been less than \$75, as the increased rental was only \$25 a month and only 2-1/2 months of the term of the new lease had run.

On November 29, 1927, defendant filed an amended affidavit of merits. It consisted of 27 separate paragraphs. By court order, entered during the trial on plaintiffs' motion on June 13, 1928, the court struck out many paragraphs and portions of others. The substance of the defenses, as disclosed from the paragraphs not stricken, is that Gleason in his lifetime did not breach any of the covenants of his said lease to plaintiffs; that plaintiffs were not evicted from said fifth floor of said building; that said judgment order entered in said forcible detainer suit was the result of an agreement between plaintiffs and the Haverford Co.; that plaintiffs were themselves guilty of breaches of covenants of the Gleason lease; and that plaintiffs did not suffer the damages as claimed or any damages.

After reviewing the pleadings and the voluminous evidence we are of the opinion that the court erred in giving to the jury

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2. The second part of the report is devoted to a

description of the methods used in the study.

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the instructions first above mentioned. The theory of plaintiffs' case, as disclosed from their amended statement of claim, was in substance that they had been evicted from said fifth floor of said building and that this eviction had been brought about by his breach of the implied covenants as contained in his lease of the premises to them and by his permitting them to be disturbed in their quiet and peaceful enjoyment thereof. The instructions assumed that plaintiffs had been evicted, although the question under the conflicting evidence was one for the jury to decide under proper instructions. In Barrett v. Hodge, 153 Ill. 479, 485, it is said: "The term 'eviction' is applied to every class of expulsion or removal. The term is not applicable to a mere trespass on the tenant's possession by the landlord, but to constitute eviction there must be something of a grave and permanent character done by the landlord, for the purpose and with the intention of depriving the tenant of the enjoyment of the demised premises. The question is therefore one of fact, dependent on the circumstances of the particular case, and to be determined by the jury." (See, also Gibbons v. Mcfield, 299 id. 455, 464; Kinsey v. Zimmerman, 329 id. 75, 80.) Plaintiffs' counsel in his brief here filed admits that "the question of eviction is ordinarily a question of fact to be determined by a jury," but he contends in substance that in the present case the judgment of the municipal court in said forcible detainer suit, entered September 25, 1933, is "res adjudicata" of that question and binding upon the defendant, as administratrix, in the present case. But said judgment order does not show that plaintiffs were then or thereafter evicted. Furthermore, it appears that in said forcible detainer suit defendant, as administratrix, although made a party defendant, was during the trial and before

judgment dismissed as a defendant, on motion of the plaintiff, Haverford Company.

Defendant's counsel urges other grounds for a reversal of the judgment, but, as there must be another trial of the case, we need not discuss them. We may, however, say that apparently the damages as awarded by the jury are excessive.

The judgment of the municipal court of October 3, 1928, is reversed and the cause is remanded.

REVERSED AND REMANDED.

Seaman and Barnes, JJ., concur.

33264

WILLIAM H. DE SENT,
Appellee,

v.

SAM BERKOWITZ,
Appellant.

252-1A-618
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

On September 11, 1928, plaintiff commenced a 4th class action in contract against defendant on the latter's promissory note for \$100, dated July 18, 1928, and payable to plaintiff's order thirty days thereafter. Defendant admitted this indebtedness and filed a set off claiming that plaintiff was indebted to him in the sum of \$173.50, and that the net balance due to him was \$73.50. On a trial without a jury in October, 1928, the court, after hearing evidence introduced by defendant to sustain his set-off, held that it had not been proven, found the issue in plaintiff's favor, assessed his damages at \$100 and entered judgment against defendant in that amount. This appeal followed.

We have examined defendant's evidence as contained in the present transcript and are of the opinion that he had no bona fide claim of set-off in any amount as against his admitted indebtedness on the note, and that the finding and judgment of the court are in accord with the evidence. The judgment is affirmed.

APPEL MAINT.

Scanlan and Barnes, JJ., concur.

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EDWIN SHIPP, CLARENCE SHIPP
and WILLIAM SHIPP, Trustees
of Shipp Realty Trusts,
Appellees.

v.

C. E. McNeill & Company,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY: LIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the municipal court, entered November 9, 1928, denying defendant's motion to open a judgment by confession on a lease and to have a trial upon the merits. To sustain the motion defendant filed a petition, sworn to by its president. The amount of the judgment, entered August 28, 1928, was \$550, which included \$25 for attorney's fees.

Attached to and made a part of plaintiffs' statement of claim was a copy of a written lease from plaintiffs to defendant, dated February 19, 1927, demising "the four story and basement brick building at 325 West Wacker drive," Chicago, for a term beginning May 1, 1927, and ending April 30, 1929, at a monthly rental of \$150, payable in advance on the first day of each and every month. The lease contained the usual clause authorizing the entry of a judgment by confession against the lessee for an rent that might be due and unpaid, and \$25 attorney's fees. In another clause is the provision that "it (the lessee) has examined and knows the condition of the premises and has received the same in good order and repair, * * ; that it will keep said premises in good repair, * * ; and that, upon termination of this lease in any way, it will yield up said premises to said first party (lessor) in good

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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condition and repair (loss by fire and ordinary wear excepted.)" In another clause it is provided that "if said second party (lessee) shall abandon or vacate said premises the same shall be re-let by the first party (lessor) for such rent, and upon such terms as said first party may see fit, and if a sufficient sum shall not be thus realized, after paying expenses of such re-letting and collecting, to satisfy the rent hereby reserved, said second party (lessee) agrees to satisfy and pay all deficiency."

In plaintiffs' statement of claim it is alleged that the rent for the months of April, May, June, July and August, 1928, aggregating \$750, has not been paid. In their affidavit of claim it is stated that there is due from defendant, "after allowing to it all just credits, deductions and set-offs" the sum of \$525, as rent, in addition to the attorney's fees.

Defendant's main ground for the reversal of the court's order is that its sworn petition presented prima facie such a defense to plaintiffs' claim as required the court to open the judgment and allow a trial upon the merits. In the petition, after admitting that it took possession of the premises under the lease and paid the monthly rent up to and including the month of March, 1928, defendant alleged in substance that on March 23, 1928, it was "compelled to and did vacate the premises * * on account of the breach of the implied covenants of the lease on the part of plaintiffs to keep said premises in a tenantable and healthy condition;" that "on divers days, from January 1, 1928, to March 23, 1928, the plumbing throughout the premises was in need of repair", but plaintiffs failed to repair same although repeatedly requested so to do; that during the same period "the walls were in such bad condition that water leaked through * * and caused ceilings to fall down," etc.; that during said period plaintiffs had knowledge that repairs

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to the plumbing and to certain walls and ceilings were needed; that "numerous automobiles and trucks obstructed the premises and prevented the proper carrying on of defendant's business by making it impossible for merchandise to be delivered to the premises or shipped therefrom;" that frequently during said period defendant complained to plaintiffs' agent of the existence of said conditions that "warned him that defendant would be compelled to vacate the premises and cancel the lease unless these conditions were remedied;" and that the existence of said conditions during said period and the refusal of plaintiffs to remedy them amounted to a "constructive eviction of defendant." It is further alleged that, since the service of execution on said confessed judgment upon defendant, it has ascertained that the premises have been leased to other parties, who are now in possession, but that the exact date of said re-renting and the amount of rent collected by plaintiffs is unknown to defendant.

Considering the allegations of the petition, which must be construed most strongly against defendant, we are of the opinion that the court did not abuse the discretion vested in it in refusing to open the judgment. (Mirsch v. Home Appliances, 242 Ill. App. 418, 422.) The petition does not prima facie disclose a case of constructive eviction of defendant as claimed. (Barrett v. Boddie, 159 Ill. 479, 485.) By the terms of the lease defendant acknowledged that when it took possession of the premises it received them in good order and repair, and it covenanted that it would keep them in good repair. And the fact, as alleged, that the passage or parking near the premises of many automobiles and trucks interfered with defendant's business, would not relieve it from its covenant to pay the stipulated rent, or justify its vacation of the premises. Plaintiffs were not responsible for these conditions, if they existed.

They did not have control of the street, on which the premises fronted, or of the traffic thereon.

And there is no merit to defendant's further contention, which is in effect that the amount of the judgment as confessed is not large enough. Although it appears that five months rent was due and unpaid under the lease, or \$750, it is to be presumed, especially in view of the allegation contained in defendant's petition that plaintiffs re-rented the premises after defendant's vacation and before the judgment was entered, that plaintiffs gave proper credit to defendant for any moneys received from others as rent.

The order of the municipal court of November 9, 1928, is affirmed.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

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33283

A. B. C. PATTERN & FOUNDRY CO.,
a corporation,

Appellant,

v.

B. V. HILLS,

Appellee.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. PRESIDING JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, commenced May 27, 1927, to recover a balance of \$134.69, claimed to be due from defendant, individually, for certain merchandise (patterns and castings) sold and delivered during the months of April and May, 1926, there was a trial without a jury in October, 1928, resulting in the court finding the issues in defendant's favor and entering a judgment against plaintiff for costs. This appeal followed.

Defendant's defense was that all said merchandise, including that for which plaintiff had not received payment, was ordered by defendant as trustee for the U. and J. Carburetor Company, for the sole use of said Carburetor Co.; that before the patterns were made and the particular merchandise sued for were delivered by plaintiff there was an express verbal agreement made between defendant and plaintiff's managing officer, Heridan, that defendant would not be held personally liable for the price of the merchandise and that plaintiff would look for its pay to the assets and funds of the Carburetor Co. in defendant's hands as trustee; and that defendant was not personally liable for the balance of the indebtedness sued for.

It is well settled law in this state that "a trustee holding property or administering a trust for the benefit of

individuals or a class of individuals, such as creditors of an insolvent, is bound personally by the contracts which he makes in that capacity," and that "such trustee, or other person acting in such relation, binds himself personally unless he exacts an agreement from the person with whom he contracts to look to the funds exclusively." (Bradner Smith & Co. v. Williams, Adm'r, 178 Ill. 420, 424-5; Austin v. Parker, 317 id. 348, 354.)

On the issue, whether such an express agreement as first above stated was made between defendant and Sheridan before the shipping of the merchandise in question, their testimony was in direct conflict. But other evidence introduced by defendant tended to confirm the testimony of defendant and negative that of Sheridan on the issue. No useful purpose will be served in outlining this other evidence. Suffice it to say that in our opinion the finding and judgment of the court in favor of defendant are sufficiently sustained by the evidence. And we do not think that the court committed reversible error, as is also contended by plaintiff's counsel, in admitting in evidence certain checks (stamped paid) payable to plaintiff's order and by it endorsed, and signed by said Carburetor Co., by "H. U. Hills, Trustee as per terms of trust agreement, dated September 19, 1923," which checks were given by defendant and received by plaintiff, in payment of other merchandise previously sold by plaintiffs and ordered of it by defendant as trustee and for the use of the Carburetor Co.

The judgment of the circuit court should be affirmed and it is so ordered.

APPROVED.

Scanlan and Barnes, JJ., concur.

33292

JOSEPH KUNICKAS,
Appellee,

v.

JOHN HANCOCK MUTUAL LIFE
INSURANCE CO., a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT:

In a 4th class action in contract, commenced in the municipal court on September 7, 1928, and based upon defendant's policy insuring the life of Anna Gribiene in the amount of \$792, there was a trial without a jury in November, 1928, resulting in the court finding the issues for plaintiff and assessing his damages at \$792. Judgment was entered against defendant upon the finding and this appeal followed.

Plaintiff, a cousin of the insured, is the named beneficiary in the policy, which is dated March 7, 1928, and on its face is the provision that "this policy shall not take effect unless upon its date the insured shall be alive and in sound health and the premium duly paid." The insured died at a hospital on May 9, 1928, (about 2 months after the policy was issued), at the age of about 45 years.

In plaintiff's statement of claim, after stating the issuance of the policy and the date of the insured's death, he alleged that notice and proofs of death were furnished to defendant; that "all other things were done as in said policy mentioned and required;" and that defendant although often requested has refused to pay the amount due under its policy. It is to be noticed that plaintiff does not rely upon any claim of waiver by defendant of

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any of the provisions or conditions of the policy.

Among the several defenses, as stated in defendant's affidavit of merits, is one that the insured "was not in sound health on the date the policy was issued."

On the trial the main issue of fact was whether the insured at that time was in sound health, and on this issue the evidence was conflicting. We have examined the oral and documentary evidence, introduced by the opposing parties and bearing upon the question, and are of the opinion that the plaintiff did not sustain the burden of showing by a preponderance of the evidence that the insured was then in sound health. Indeed we think that it appears from all the evidence that she then had diseases of the heart and kidneys and was injuriously affected by alcoholism. It has frequently been decided by the appellate courts in this state that a provision in a policy of life insurance, such as is contained in the policy sued upon, that the policy shall not take effect unless at its date the insured be in sound health, is a condition precedent, making it incumbent upon one suing upon the policy to prove affirmatively such fact, and that upon failure so to do by a preponderance of the evidence no recovery on the policy can be had. (Lewandowski v. Western, etc., Life Ins. Co., 241 Ill. app. 55, 57; Daniels Motor Sales Co. v. New York Life Ins. Co., 220 id. 83, 86; Laughlin v. North American Benefit Corp., 244 id. 391, 402; Gulski v. Metropolitan Life Ins. Co., 196 id. 76, 79.)

Plaintiff's counsel here contend in substance that there is evidence disclosing that defendant waived the requirement that plaintiff prove, as a condition precedent to recovery, that the insured was in sound health when the policy was issued. We find no

evidence of waiver by defendant of any of the conditions of the policy. Furthermore, no waiver by defendant of any conditions was alleged in plaintiff's statement of claim. (See Feder v. Midland Casualty Co.; 316 Ill. 552, 560.)

The judgment of the municipal court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Seculan and Barnes, JJ., concur.

[illegible]

33292.

FINDING OF FACT.

We find as an ultimate fact in this case that on March 7, 1928, the day of the date and issuance of the policy in question, the insured, Anna Gribiene, was not in sound health.

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HELEN GUDINAS and ALBINA
MASTAVICH,

Appellees,

v.

GLOBE MUTUAL LIFE INSURANCE
CO. OF CHICAGO, a corporation,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. PRESIDING JUDGE SHILLY: LIVELY AND ORIGIN OF THE CASE.

In an action in assumpsit, commenced May 7, 1926, by the beneficiaries of a policy of insurance for \$1,000, issued by defendant on the life of John Gudinas on April 28, 1914, there was a trial before a jury in November, 1923, resulting in a verdict and judgment for \$146.67 against defendant. This appeal followed.

In plaintiffs' declaration (one special count) the policy is set out in full, together with the written application which purports on its face to be signed by John Gudinas on April 2, 1914. And it is alleged that the beneficiaries are respectively the wife and step-son of the insured; that the insured died on November 8, 1925; that due proofs of his death were made; that defendant has refused to pay the amount of the policy; and that there is due to plaintiffs the sum of \$1,000, together with legal interest thereon from November 8, 1925.

One of the questions to be answered in the application by the applicant is: "When were you last attended by a physician?" and the answer is "Never." Below the questions and answers and above the purported signature of "J. Gudinas" is: "It is hereby agreed by and between the parties hereto that the above questions and answers,

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and those on the reverse side, are material to the risk, and any untrue or false statement or answer made to the examining physician, agent, or other person, shall make the policy null and void."

Defendant filed a plea of the general issue and seven special pleas, three of which subsequently were withdrawn. The second plea, as amended, alleged that the purported signature of the insured appearing on the written application was not his signature, and was placed there without his knowledge or consent. The fifth plea alleged that the policy provided that it would not take effect if before its date the insured had been attended by a physician for any serious disease or complaint, unless so stated in the application, and that before said date he had been attended by a physician for such a disease or complaint and it was not so stated in the application, and that defendant had offered to return the premiums, etc. The seventh plea alleged that the premium due on April 23, 1925, was not then paid or within the grace period and was unpaid at the time of the insured's death, whereby the policy under its terms became void. The eighth plea, as amended, alleged that the policy was issued upon a written application bearing what purported to be the signature of John Gudinas; that if said application is his genuine one he was asked "When were you last attended by a physician?"; that he answered the question "Never"; that such answer was false and fraudulent; that previous to the time of making the application, and in the years 1923 and 1924, he had been attended by a physician for asthma and bronchitis and other ailments; and that said answer and statement by the terms of the policy were material to the risk and were warranted to be true. To these special pleas replies were filed.

The evidence on the trial as to the issues made by said

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special pleas (especially the eighth) and replications thereto, was in sharp conflict. The court gave 16 instructions offered by plaintiffs and 18 instructions offered by defendant. Some of these offered by plaintiffs are apparently in conflict with others offered by defendant and the instructions taken in their entirety tended to confuse the jury. And in our opinion some of plaintiffs' given instructions did not correctly state the law. Plaintiffs' given instruction, No. 1, is as follows:

"The Court instructs the jury that if they believe from the evidence that the deceased was guilty of no fraud and made no intentional misstatements in the application which is attached to the policy of insurance in this case that then said policy is not rendered invalid even though they may find from the evidence that some of the answers therein contained were untrue."

We think that this instruction, as applied to the applicant's answer that prior to the date of the application he had "never" been attended by a physician, was incorrect and erroneous. The answer was a representation material to the risk, and one upon which defendant had a right to rely when deciding to issue the policy, and it is immaterial under the terms of the policy (it appearing from a preponderance of the evidence that the answer was untrue) whether the answer was made in good faith. In Grosse v. Knights of Honor, 254 Ill. 80, 84, it is said: "The rule established in this State is, that where an application for life insurance is expressly declared to be a part of the policy and the statements therein contained are warranted to be true, such statements will be deemed material whether they are so or not, and, if shown to be false, there can be no recovery on the policy however innocently the statements may have been made." In U. S. Fidelity v. First Nat. Bank, 233 Ill. 475, 481, it is said: "A material misrepresentation, whether made intentionally and knowingly or through mistake and in good faith, will avoid the policy." And we think that for the same reasons it was error for the court to give to the jury plaintiffs' instruction No. 2, which

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is somewhat similar in its import to No. 1.

Relative to the issue of fact, as made by the second plea and replication thereto, upon which the evidence also was conflicting, the court gave to the jury plaintiffs' instruction No. 8, as follows:

"The Court instructs the jury that if they believe from the evidence that the agents of the defendant committed a fraud upon the defendant, yet if they believe from the evidence that plaintiffs or either of them or the deceased did not engage in or was not a party to the fraud, the jury are instructed that they must find the issues for the plaintiffs."

This instruction directs a verdict. But it leaves out of consideration all of the ~~xxxx~~ defenses made by defendant, except that of the claimed forgery of the applicant's name to the application. The jury are told in effect that, if neither the insured nor the beneficiaries were parties to the claimed fraud or forgery, then plaintiffs are entitled to recover on the policy, and that defendant's other defenses, as set forth in the other special pleas, may be entirely disregarded by them.

We think that the above errors in the instructions require that the judgment appealed from be reversed and the cause remanded for a new trial.

R. V. [redacted] AND [redacted].

Scanlan and Barnes, JJ., concur.

25314-713

33335

GLADYS MARY REARDON,
Appellee,

v.

AUSTIN JOHN REARDON,
Appellant.

APPEAL FROM SUPERIOR COURT,
COCK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On December 5, 1928, during the pendency of an action for divorce brought by the wife against her husband on the ground of habitual drunkenness, the court, on complainant's motion and after hearing evidence and arguments of counsel ordered that defendant pay to complainant for "temporary alimony" the sum of \$75 a month, viz, \$37.50 on December 6, 1928, and \$37.50 each half month thereafter; and that he also pay to her, "as temporary solicitor's fees," the sum of \$100, - \$50 to be paid on December 15, 1928, and \$50 on January 15, 1929. Defendant has appealed from the order.

No findings of fact are contained in the order, nor is there any certificate of evidence contained in the present transcript, showing what transpired on the hearing of complainant's motion.

The sole ground for the reversal of the order is the absence of any findings of fact in the order, or a certificate of evidence. It is the well established rule in this State that in equity cases the party standing upon a final decree in his favor must preserve in the record the evidence upon which the decree is based, or the decree must find the specific facts that were proven on the hearing. But we do not think that such rule must be applied where, as here, pending the final hearing in an action for divorce brought by the wife, the court orders the husband to pay alimony



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and solicitor's fees to the wife, and an appeal is taken from that order. Such allowances under section 15 of the Divorce Act are largely within the discretion of the trial court, and they should not be disturbed by a reviewing court unless it affirmatively appears that the trial court abused its discretion by allowing excessive amounts. In Dooley v. Dooley, 19 Ill. App. 391, the chancellor ordered certain payments to be made to the wife for alimony, pendente lite. One of the points made on appeal was that there was no evidence in the record to sustain the order. In affirming it the court said (p. 395):

"It would seem from an examination of the reported cases that decrees for alimony pendente lite are interfered with by the courts of review only where it is affirmatively shown that the amount allowed is excessive. The husband, if he deems himself aggrieved, always has it in his power to remedy the improper or excessive decree by taking a certificate of the evidence. Besides this, the allowance is but temporary and subject to modification by the court below. Appeals in matters of this sort should only be sustained when they are clearly meritorious, as their evident tendency is to defeat the just and equitable intention of the statute, which is to make a temporary provision for the support of the wife and children."

There is nothing contained in the present record which affirmatively shows that the allowances complained of are excessive or that in making them the chancellor abused his discretion. The contrary is disclosed from an examination of complainant's sworn bill, her sworn petition for temporary alimony, etc., and from defendant's admissions in his answers thereto. It appears that the parties were married in Chicago on November 4, 1920; that they have three children - the oldest being about 5 years of age; that the parties lived together until about July 14, 1928, when she left him taking the children with her; and that he is employed and earning about \$-18 a month. In defendant's answer to the bill he "admits he is well able to maintain and support complainant and their children, and that he has been able to do so for many years last past."

The order appealed from should be and it is affirmed.
Scanlan and Barnes, JJ., concur.

AP 1000.

33344

258-113

WILLIAM C. HARTRAY, administrator
of the estate of Ralph Optie,
deceased,

Appellee.

v.

BOWMAN DAIRY COMPANY,
a corporation,

Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted to reverse a judgment for \$6,000, rendered against defendant by the superior court of Cook county on December 1, 1928, following the verdict of a jury, in an action for damages for negligently causing the death of plaintiff's intestate, Ralph Optie, a child of about three years of age, on the morning of August 5, 1927.

The evidence disclosed that he was run down by a horse and wagon, owned by defendant and driven by one of its servants, on Armour street near its intersection with Austin avenue, Chicago, that a wheel or wheels of the wagon passed over his neck and head, causing fatal injuries; and that after being taken on the same morning to a hospital and there laid upon a table he died. The evidence further disclosed that he left him surviving as his next of kin his father, Tony Optie, his mother, Angeline, his brother, Theodore, and two half brothers; that the father usually worked "as a laborer;" that on the morning of the accident he was not engaged in his usual work but was chopping wood in the yard of the family home; that the mother had gone to the "city hall" on some business, leaving Ralph and Theodore (5 years of age) in the father's charge; and that in some manner Ralph got into the street, without the

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father's knowledge, and while there the accident occurred.

Plaintiff's declaration consisted of two counts - one charging defendant with negligence generally in the driving of the horse and wagon, and the other charging negligence, while driving the wagon in the public street, in failing to keep a proper lookout for persons in the street. Defendant filed a plea of the general issue. No special plea or pleas were filed.

Four grounds for reversal of the judgment are urged and argued in the brief of defendant's counsel. It is contended that it was not sufficiently proved that plaintiff was the duly appointed administrator of the estate of the deceased, or that he had any right to maintain the action. In the absence of a special plea the contention is without merit. It has frequently been decided in this State that in actions similar to the present one, where the general issue alone is pleaded, such plea does not put in issue the character or capacity in which the plaintiff sues (McNulta v. Lockridge, 137 Ill. 270, 284); and that in an action by an administrator, where no special plea is interposed questioning his right to sue as such, it is not necessary for him to make any proof in respect to his appointment as administrator or his right to sue in his representative capacity. (Union R. & T. Co. v. Shacklet, 119 Ill. 232, 238; Geelitz & Co. v. Industrial Board, 278 id. 164, 173.)

And, after reviewing the evidence, we do not think there is any merit in counsel's further contentions (a) that "there is no showing that the accident caused the death of Ralph Optie," and (b) that "there is no showing that the accident occurred in the State of Illinois." As we read the evidence it clearly appears that plaintiff's intestate while in a public street was run down by defendant's horse and wagon, that a wheel or wheels of the wagon ran over his neck and head, and that his death, which occurred

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shortly thereafter, was the direct result of injuries received when run over. And we think that the evidence sufficiently shows that the accident happened within the city of Chicago. That it occurred on Armour street near its intersection with Austin avenue, and that the family house of the Optie's was in the rear of a lot fronting on Armour street, and that there was a yard around or about the house which was used by the family, is clearly shown. And Mrs. Angeline Optie testified to the effect that when she left the house to go down town (shortly before the happening of the accident) her husband and the two young children were in the yard, that when she got back Ralph Optie was dead, and that all this "was in Chicago, Cook county, Illinois."

And we cannot say that the verdict and judgment of \$6,000 are excessive, as is also contended by counsel. We fail to find that anything improper occurred upon the trial that would tend to arouse passion or prejudice in the minds of the jury. Notwithstanding the tender age of the decedent and the evident somewhat limited financial circumstances of the parents, we are not disposed to disturb the jury's verdict. (See, Twan v. Boston Store, 177 Ill. App. 349, 351; Chicago City Ry. Co. v. Strong, 129 id. 511, 516; U. S. Brewing Co. v. Toltenberg, 113 id. 435, 441.)

The judgment of the superior court should be and is affirmed.

APPEAL .

Scanlan and Barnes, JJ., concur.

33365

MARTIN HOSE,
Appellee,
v.
GEORGE W. GRIFFEN,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUDGE CHARLES A. LIVINGSTON: THE OPINION OF THE COURT.

On October 18, 1928, a judgment for \$340, by confession on a lease, was entered against defendant in said municipal court. The amount of the judgment was made up of rent claimed to be due for the months of July, August and September, 1928, at \$100 a month, and 40 for attorney's fees. The premises involved are described as "Apartment No. 2 on the second floor of the building located at 1814 East 68th street, Chicago." The lease is dated March 29, 1928, and the term is for one year, commencing May 1, 1928, and expiring April 30, 1929. On its face are the words "List submitted shall be made part of this lease to be completed by June 1st, or this lease is to be cancelled." No list was attached to the lease when the judgment was confessed. On November 16, 1928, defendant appeared and moved that the judgment be vacated and that he be given leave to plead, etc., supporting the motion by his petition or affidavit. By agreement between the attorneys for the parties the hearing on the motion was continued to December 11, 1928. The bill of exceptions disclosed that on that day, on a hearing had, said petition or affidavit was read, and no counter affidavits were presented or other evidence heard. The court thereupon denied defendant's motion and this appeal followed. No brief has here been filed by plaintiff.

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In said petition or affidavit defendant states that the first notice he had of said judgment being confessed was when he was served with an execution thereon on November 14, 1928, and that the words in said lease, above mentioned, referred to a certain list of "repairs and decorations" which defendant had submitted to plaintiff and which plaintiff had agreed to complete by June 1, 1928. The list is attached to the petition and shows on its face the different repairs and decorations to be made in the apartment. Defendant further stated that no part of the repairs and decorating work was done by plaintiff as agreed, prior to June 1, 1928, and that because of plaintiff's failure to do such work defendant sought and obtained other suitable living quarters, and on June 15, 1928, vacated said apartment and premises, removed all of his effects therefrom and surrendered the premises to plaintiff's duly authorized agent.

I think that under the facts as disclosed the court erred in not granting defendant's motion that the confessed judgment be opened, etc. Accordingly, the order of December 11, 1928, is reversed and the cause is remanded with directions that the court open said judgment and give defendant leave to file a plea to the merits, the judgment in the meantime to stand as security.

REVEREND JAMES M. HENRY, JUDGE OF THE COURT.

McGowan and Barnes, JJ., concur.

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NORTHERN TRUST CO.,
a corporation,
Complainant,

v.

A. A. ALLEN,
(Defendant),
Appellee,

SAM LICHTENSTEIN,
(Defendant),
Appellant.

25-184
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE BARNES delivered the opinion of the court.

This was a bill of interpleader brought by the Northern Trust Company, a banking corporation, asking said Lichtenstein and Allen defendants, to determine to which should be awarded a certificate for 80 shares of stock of the American Exchange National Bank, of Dallas, Texas, valued at about \$300 a share. The certificate had been put up as collateral on a loan from said Trust Company to said Lichtenstein and had been borrowed from said Allen under circumstances hereinafter stated.

Each of said defendants filed an answer to the bill (Allen's subsequently amended) claiming to be the owner of the stock, and each filed his cross bill to have the same awarded to him, upon which issues were duly taken. The decree appealed from awarded the stock to Allen, dismissed Lichtenstein's cross bill for want of equity, and directed the dismissal of complainant's bill of complaint on delivery of the certificate of said stock to Allen.

There is little controversy as to the facts except as to the extent of knowledge by each defendant of the other's part in

the transaction. We have thoroughly reviewed the evidence and find no occasion to dissent from the chancellor's findings. They include the material facts of the case, and in substance are as follows:

The certificate in question, dated February 21, 1925, was issued to and stands in the name of said Allen, without indorsement. March 2, 1925, Lichtenstein applied to complainant for a loan of \$14,000. He was accompanied by one Downs who acted as Lichtenstein's agent and represented to complainant that the proceeds of the loan were to be used in the purchase of 155 shares of the common stock of Sears, Roebuck & Co., and when obtained would be deposited as collateral security for said loan. They were not so used. Lichtenstein then and there gave complainant a trust receipt agreeing therein to make said deposit. The loan was made on the condition that the said Sears, Roebuck & Co. stock would be deposited with complainant within seven days. Lichtenstein delivered the proceeds from the loan to Downs as his agent, not in fact for the purchase of said Sears, Roebuck & Co. stock, but for the purpose of completing other transactions theretofore entered into by said Downs for said Lichtenstein, through which each expected large profits. Lichtenstein failing to deposit said Sears, Roebuck & Co. stock within the stipulated time, complainant repeatedly called on him therefor. Lichtenstein then stated to Downs that something would have to be done about the trust receipt, and Downs informed Lichtenstein that he would try to borrow some stock somewhere for Lichtenstein so the latter would not be liable on the trust receipt. Thereafter, March 25, 1925, Downs applied to Allen to borrow said certificate, falsely representing to him that he wished to use it as collateral security on a loan to be made by him from complainant of not exceeding \$5,000 and would return the stock to Allen in five

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days. Allen then loaned the stock to Downs for said purpose but refused to indorse the certificate. Downs, in the presence of Lichtenstein, tendered the certificate to complainant as collateral security to the Lichtenstein loan. It was then known by the bank, Downs and Lichtenstein that the certificate was the property of Allen, and it was known by Lichtenstein that said certificate would remain only temporarily with the bank as security for his loan.

The court found from the above state of facts in procuring said certificate of stock from Allen and depositing the same with complainant, Downs was the agent of Lichtenstein and procured said certificate by fraud, and that the delivery thereof by Allen was made under such mistake as to make the delivery iniquitable, and that Allen had the right to possession of the same, having never authorized the pledging thereof for a loan to Lichtenstein.

A few additional facts bearing on the issues and aiding in reaching the court's conclusions, are as follows: Seeing the stock was in the name of Allen, unindorsed, complainant's cashier, Nelson, although it had attached thereto a blank power of attorney signed by Allen, purporting to assign and authorizing a transfer of the stock (without designating the stock or the attorney), knowing the stock belonged to Allen required Allen's specific permission to use it as collateral and handed Lichtenstein a blank form of hypothecation to be signed by Allen, which the latter there handed to Downs and they went out together. Lichtenstein did not accompany Downs into Allen's presence but, saying to Downs he might be embarrassed by questions, remained outside until Downs procured the authorization and joined him to go back to Nelson. When they returned to the bank Downs handed to Nelson in Lichtenstein's presence the certificate, the blank power of attorney and the blank authority

of hypothecation signed by Allen. Allen did not know Lichtenstein nor that Downs was acting for him, or for anybody but himself in the matter. The authorization was addressed to complainant, was undated and reads:

"Gentlemen:

You are hereby notified that has full authority to deposit with you, as collateral security, for any of his indebtedness to you, now or at any time hereafter existing, any securities belonging to me, including the right on his part to give you as full power of sale and control over said securities as he could give were they his own property."

On delivery of the papers to Nelson the trust receipt for the Sears, Roebuck & Co. stock was handed back to Lichtenstein and he signed a receipt therefor, stating that said certificate of stock was deposited in exchange therefor.

While there was conflicting testimony as to conversations, some of which were immaterial, had at the bank and between the parties bearing on the transactions as aforesaid, we shall not review ^{them} ~~as~~ we think the evidence sustains the facts and findings as above stated.

The question here is not one between pledgor and pledgee, Lichtenstein and said bank, nor one between the latter and Allen. The bank having no further use for the collateral and having offered to surrender the certificate to the rightful owner, the status of Lichtenstein and Allen is the same as it was before the delivery of the certificate to the bank. The question, therefore, is whether the above state of facts brings Allen's claim of right to reclaim the certificate within section 7 of the Uniform Stock Transfer Act (Ch. 32, sec. 7, Cahill's Stat.) Notwithstanding title to a certificate and the shares represented thereby may under sec. 1 of said act be transferred by delivery thereof, even though not indorsed, with a written assignment or power of attorney in blank, such delivery is

Eur. J. Clin. Invest. 1978; **8**, 60-67.

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13. 2010年10月10日，甲、乙、丙三人共同出资设立了A公司，甲、乙、丙三人分别持有A公司30%、30%、40%的股份。A公司成立后，因经营不善，于2011年10月10日被法院宣告破产。A公司破产清算时，发现A公司欠B公司100万元，B公司于2011年10月10日向A公司主张权利，但A公司当时已资不抵债。B公司于2011年10月10日向A公司主张权利，但A公司当时已资不抵债。B公司于2011年10月10日向A公司主张权利，但A公司当时已资不抵债。

Journal of Management Studies, 20(6), 791-804.

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Figure 1. The effect of the concentration of the *Agaricus bisporus* spores on the growth of *Agaricus bisporus* and *Agaricus bisporus* spores on the growth of *Agaricus bisporus* spores.

not effectual (see sec. 6) to transfer title under the exceptions referred to in said section 7. It is therein provided that if the indorsement or delivery of a certificate (a) was procured by fraud or (b) was made under such mistake as to make the indorsement or delivery inequitable, the certificate may be reclaimed and the transfer thereof rescinded unless:

- "(1) The certificate has been transferred to a purchaser for value in good faith without notice of any facts making the transfer wrongful, or
- (2) The injured person has elected to waive the injury, or has been guilty of laches in endeavoring to enforce his rights."

None of these conditions existed in the present case to take it out of the exceptions stated in sec. 7. The certificate had not been transferred to a purchaser for value, and in our opinion there has been no laches on the part of Allen in endeavoring to enforce his rights. He repeatedly demanded the return of the certificate from Downs as early at least as seven weeks after the delivery thereof to him. He seems to have trusted Downs and his subsequent promise to return the same within a reasonable time. He did not know, however, until early the following year that the certificate was held as collateral for a loan to Lichtenstein. Verbal and written demands were then made on the bank for the return of the stock to Allen. This led to the institution of this proceeding. We fail to see that there was any laches on the part of Allen under such circumstances or, if there was, that Lichtenstein suffered any injury therefrom. He had the use of the collateral in the meantime and had reduced his loans from the bank to such an extent that the bank no longer needed this particular collateral.

Nor is there any basis for Lichtenstein's claim of right to reimbursement by Allen upon the theory that he advanced additional money to Downs on the strength of his belief that he had good title to the certificate in question. While he appears to have advanced

a large amount of money to Downs for which he received no return there is no evidence that he did so on faith of Downs' ownership of the certificate or that Downs ever pledged the same to him as security for money he so advanced.

Nor is the doctrine he invokes that when one of two innocent parties must suffer from the fraud of a third the loss must fall on him who enabled the third party to perpetrate the fraud, applicable to the case, unless it be against Lichtenstein himself through whose agent the fraud was perpetrated. There is nothing in the facts of this case that places Lichtenstein either in the position of a pledgee, transferee or an innocent party. Most of the decisions he cites have application to one position or the other. His position is no different from a holder of borrowed stock that has not been transferred or hypothecated, after the authority to use it has been rescinded.

We think, therefore, the stock was properly awarded to Allen.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

33173

HARRY W. STANDIDGE,
Plaintiff in Error,

v.
CITY HALL SQUARE COMPANY,
a corporation,
Defendant in Error.

APPEAL FROM THE CIRCUIT
COURT, DEKALB COUNTY.

MR. JUSTICE BARNER DELIVERED THE OPINION OF THE COURT.

Complainant Standidge filed his bill of complaint herein against defendant company to compel it to deliver to him an exact copy of a lease from July 1, 1923, to April 30, 1926, to the 21st floor of an office building owned and operated by defendant, and prayed for both a temporary and permanent injunction to restrain defendant's interference with his occupancy under said lease.

The company answered, declaring the tenure of complainant cancelled and terminated, and filed a cross bill to enjoin complainant from operating "public dances" in the premises and to have its cancellation and termination of the lease confirmed.

After reference to a master in chancery to determine who was entitled to a preliminary injunction, one was granted under the prayer of the cross bill and on appeal to this court was affirmed April 30, 1924. (234 Ill. pp. 622.) While the appeal was pending complainant continued to occupy the premises without payment of rent. After such affirmance cross complainant filed a supplemental cross bill to recover the rental value for the occupancy from October 1, 1923. Another reference was had on the merits of the issues raised by the bill, cross bill and supplemental cross bill, and their respective answers and replications. In conformity with the master's recommendation a decree was entered July 23, 1926, in

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accordance with the prayer of the cross bill and supplemental cross bill, finding that complainant had no further right to the use of said premises and confirming the forfeiture of the lease, and awarding defendant \$12,600 as rental value for the use and occupancy of said premises from October 1, 1923, to June 30, 1925, when complainant vacated the premises, and holding that but for so vacating them cross complainant would have been entitled to a permanent injunction under its cross bill and the same would have been granted.

This writ seeks a review of that decree. The writ was sued out of the Supreme Court but that court refused to take jurisdiction of the case and transferred it to this court.

It appears from the evidence that in January, 1921, Standidge took over a lease of the premises in question to the Aviation Club for the express purpose of allowing the Lawyers Association of Illinois, of which he was a former president, to have headquarters there with said club. That lease expired June 30, 1922. It limited the use of the premises "for club rooms and for no other use or purpose." At its expiration a lease with a like restriction as to the use of the premises was made to Standidge for another year. Before its expiration negotiations were begun for another lease to run from July 1, 1923, to April 30, 1926. Pursuant thereto a lease for the premises for that period dated June 19, 1923, was prepared and submitted to Standidge. He executed the same and returned it to defendant company. Defendant retained the same but did not sign it. Standidge paid and the lessor received the rental called for therein of \$600 monthly in advance, for the months of July, August and September.

About the 4th of the latter month the company protested against and required the discontinuance of dances as then conducted by complainant in said rooms. Insisting upon the right to continue

them complainant on the 13th of that month filed his bill herein in the nature of a bill for specific performance, asking for an injunction as aforesaid, and the company shut off elevator service to that floor after 10 o'clock in the evening, and on September 19, 1923, notified him of the cancellation of the lease, and filed its answer and also its cross bill.

All of said leases provided that the premises were to be used "for club rooms and for no other purpose." The pivotal question of fact on which the right to equitable relief either under the bill or the cross bill turns is whether there was such a violation of the terms of the lease or agreement under which complainant held tenure of the premises as justified termination thereof.

Under the prior leases by arrangement with the lessees dancing was conducted by various clubs and other organizations in said rooms as a part of their entertainment, and as such was not questioned. The premises still continued to be used as the headquarters or club rooms of said Lawyers Association. That the lessor knew of such dancing and deemed the same an incidental feature of a regular club organization is not questioned. But it is the claim of cross complainant that without its acquiescence complainant conducted dances on said premises that were public in their character and not connected with any legitimate club nor within the use of the rooms contemplated by the lease in question or any of the leases under which complainant had occupied the premises. Complainant contends that the dances he conducted were within the provisions of the lease as understood at the time of the negotiations therefor and were conducted with the knowledge and acquiescence of the lessor's manager with whom the negotiations were conducted.

About the first of May, 1923, complainant began conducting

dances in said room under the name of "Up-In-The-Clouds-Club." He had caused distribution about that time of cards inviting attendance to dances under the auspices of such a club and membership in it. According to his own testimony it had no constitution or by-laws until drawn up by him about September 1, 1933, whether three or four days before or after, he was unable to say. The evidence indicates that it was after the lesser made complaint about the use of the premises for such dances. While said club was thus given formal existence it was, prior to and after that time, actually complainant's individual enterprise conducted solely by him and for revenue purposes for his sole benefit. It had no initiation fee, no dues, and no such membership as characterizes a club. The girls were brought in by advertisement and telephone, and complainant conceded that there were only three male members, himself, one O'Malley, who remained in the room to answer telephone calls from girls whose attendance he had advertised for, and one Herman, whom he called "Sergeant at Arms" and who acted in the capacity of floor manager. They were as a matter of fact mere employees of complainant who assisted him in conducting such dances. Notwithstanding this limited male "membership" there were 250 males in attendance at the last dance had before complainant testified.

It appears that attendance was secured in the following manner: Complainant ran blind advertisements in the daily papers reading, "Girls-Attractive for dancing evenings with best group in city. Call Dearborn 4120." That telephone number was listed in the telephone directory as that of the Lawyers Association of Illinois which used said premises as aforesaid. In the editions of the Chicago Daily Law Bulletin published May 1, 11 and 12, 1933, complainant placed an advertisement that there would be dancing for

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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three nights of each week at the association's club rooms. These dances purported to be held under the auspices of such association. It does not appear, however, that the Lawyers Association or any other club or association authorized or patronized the dances that were held on the three nights in the week so advertised. These advertisements and circulation of cards brought attendance to the room. In reality, as the evidence unquestionably shows, the conducting of these dances, which continued until their discontinuance was requested, was complainant's individual enterprise. There were a few couples only in May and June but complainant testified that there were as many as 50 couples on the floor in the summer months and an attendance of 250 men the Saturday evening before the hearing started.

Summarizing the situation under the evidence in the former opinion it was said: "The financial plan under which the dances were conducted involved a charge of 10 cents to each man, on his entrance to the premises, as a check room charge, and a further charge of 10 cents for each dance in which he took part. The men bought dance tickets at 10 cents apiece. After each dance the men handed a ticket to the girls with whom they had danced and at the end of the evening the girls presented their tickets to the complainant and he paid them 5 cents for each ticket so turned in, keeping the balance himself. The evidence showed that for the most part the girls had no acquaintance with the men in attendance, nor the men with the girls, prior to their meeting on the floor at these dances. The evidence not only shows that the dances which were conducted on the premises were public dances but it further shows that they were so regarded by everyone who had anything to do with them." In its opinion the court reviewed quite fully the

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1942-1943

1944-1945

1946-1947

1948-1949

1950-1951

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evidence bearing on the character of such dances and of the "club" under which they were conducted, and said:

"In our opinion the conclusion is irresistible from complainant's own testimony and the other testimony to which reference has been made in this connection, that this so-called club was in no sense such a club or organization as the Aviation Club or the Lawyers' Association, or any of the other bona fide organizations which had been occupying these premises under the complainant's lease. The Up-In-The-Clouds Club was the complainant. * * * He said so himself, in effect, in his testimony. It clearly was devised by him, in an attempt to bring the public dances he was conducting within the provisions of his lease, under which he held the premises to be used 'for club rooms.'"

The court then went on to review the contention then made, and still made, by complainant that defendant knew all about these dances and the manner in which they were conducted and was thereby estopped to compel their discontinuance. From the evidence submitted upon that subject and reviewed in the opinion at some length, the court concluded that the dances in question were in the nature of public dances not within the provisions of the lease by which complainant had possession of the premises "for use as club rooms;" that the "Up-In-The-Clouds Club" was in fact complainant and that by use of that designation the dances were not brought within either the letter or the spirit of the lease, and that prior to the time defendant directed that the dances be discontinued, or within a reasonable time thereof, its agents were not aware of the nature of the dances and the methods by which they were carried on, and that the facts were not such as to preclude defendant from receiving the relief prayed for and granted by the preliminary injunction.

It was stipulated that the testimony and exhibits introduced in the hearing had upon the application for a temporary injunction should be used before the master to whom the cause was referred upon its merits. We have carefully reviewed the additional testimony bearing upon the question above referred to and involved

1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

$$f(x) = \begin{cases} x^2 & \text{if } x \in [0, 1] \\ 2x - 1 & \text{if } x \in (1, 2] \\ x^2 - 2x + 1 & \text{if } x \in (2, 3] \\ \vdots \end{cases}$$

It is shown that the function $f(x)$ is continuous on the interval $[0, 3]$ and that it is differentiable on the interval $(0, 3)$ except at the points $x = 1$ and $x = 2$. The derivative of the function $f(x)$ is given by the formula

$$f'(x) = \begin{cases} 2x & \text{if } x \in (0, 1) \\ 2 & \text{if } x \in (1, 2) \\ 2x - 2 & \text{if } x \in (2, 3) \\ \vdots \end{cases}$$

The function $f(x)$ is also shown to be differentiable at the points $x = 1$ and $x = 2$ with the derivatives $f'(1) = 2$ and $f'(2) = 2$ respectively.

2. The second part of the paper is devoted to the study of the properties of the function $g(x)$ defined by the equation

$$g(x) = \begin{cases} x^2 & \text{if } x \in [0, 1] \\ 2x - 1 & \text{if } x \in (1, 2] \\ x^2 - 2x + 1 & \text{if } x \in (2, 3] \\ \vdots \end{cases}$$

It is shown that the function $g(x)$ is continuous on the interval $[0, 3]$ and that it is differentiable on the interval $(0, 3)$ except at the points $x = 1$ and $x = 2$. The derivative of the function $g(x)$ is given by the formula

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The function $g(x)$ is also shown to be differentiable at the points $x = 1$ and $x = 2$ with the derivatives $g'(1) = 2$ and $g'(2) = 2$ respectively.

3. The third part of the paper is devoted to the study of the properties of the function $h(x)$ defined by the equation

$$h(x) = \begin{cases} x^2 & \text{if } x \in [0, 1] \\ 2x - 1 & \text{if } x \in (1, 2] \\ x^2 - 2x + 1 & \text{if } x \in (2, 3] \\ \vdots \end{cases}$$

It is shown that the function $h(x)$ is continuous on the interval $[0, 3]$ and that it is differentiable on the interval $(0, 3)$ except at the points $x = 1$ and $x = 2$. The derivative of the function $h(x)$ is given by the formula

in the hearing on the appeal from the temporary injunction and we fail to see that it was such as would justify a different conclusion reached as aforesaid in the former opinion of this court in affirming the temporary injunction. Any variant testimony heard at the second hearing tending to support complainant's position is not, in our opinion, such as to change the conclusions reached in said former opinion. The findings of the master in his report of the entire evidence conform thereto in every material respect, and they were thoroughly reviewed by the chancellor on hearing the exceptions to the report. We do not think it can reasonably be said that the decree in confirming those findings was manifestly against the weight of the evidence.

Reaching that conclusion it would subserve no good purpose to extend this opinion by an analysis of the evidence so adduced. We think, therefore, that so far as the decree rests upon the findings that without the knowledge, acquiescence or consent of the lessor, the cross defendant Standidge ran, controlled, managed and operated upon said premises a public dance hall contrary to and in violation of the terms and provisions under which he was using and occupying said premises, it is amply supported by the evidence.

The question was raised as to the character of complainant's tenancy whether it was under said three year lease, or as a holdover under his prior lease, or as a tenant from month to month. But whatever the form or character of complainant's tenure, if, as a matter of fact, it was upon the understanding and agreement that the premises were to be used for club rooms only and for no other purpose, and the agreement in that respect was violated and because of that violation the tenure was properly terminated, the character of the tenure becomes a mere

academic question. While the cross bill alleged that the agreement was oral and not in writing and repugnant to the statute of frauds, and that defendant occupied the premises as a tenant from year to year, holding over under his prior lease, and while the chancellor held that under the statute of frauds the lease on which complainant relied was not enforceable against cross complainant company and that cross defendant Standidge was occupying said premises as a tenant from month to month, yet we think a discussion of the real nature of the tenancy is wholly unnecessary and has no bearing on the real equities of the cross bill. For the cross bill was predicated not merely upon such construction of complainant's tenure but in the alternative, that if defendant was occupying said premises as a holdover tenant under his previous lease or as a tenant under the lease expiring April 30, 1936, he had violated the provision contained in each restricting the use and occupancy of said premises for club rooms and no other purpose.

Even though we may differ as to the finding that the statute of frauds was applicable, that conclusion does not affect cross complainant's right to relief founded on complainant's breach of the terms of the very lease under which he claimed relief, nor necessitate a modification of the decree. It is not open to question that the cross bill's claim to equitable relief by way of an injunction was predicated in the alternative upon such alleged breach, its continuance and the termination of complainant's tenure in consequence thereof. If well-founded in that respect it logically follows that complainant was not entitled to a permanent injunction and cross complainant was. This conclusion answers most of the points made in plaintiff in error's brief. Nor does the fact that complainant had vacated the premises at the time of the entry of

the decree, thus leaving as the only practical relief a judgment for their continued use and occupancy, deprive cross complainant's right to relief in equity, such legal relief being incident to the equitable relief sought under the cross bill. No question arises here as to the amount of the decretal judgment.

Being unwilling, therefore, to disturb the master's and the chancellor's findings upon the pivotal questions of fact at issue, namely, whether there was a violation of the terms of the lease or agreement under which complainant held tenure of the premises, and whether cross complainant was estopped from enforcing its forfeiture there seems to be little else necessary for consideration.

Many of the points argued by plaintiff in error seem to us somewhat technical and quite aside from the merits of the controversy and calculated to lead away from the controlling issues. The legal principles invoked will not be questioned but their application to the facts of the case and the pleadings is somewhat strained. As before stated the bill was in the nature of one for a specific performance of a particular lease. The right thereto was denied on the ground that it had been violated and terminated, and predicated upon that claim equitable relief by way of injunction was sought under the cross bill. Complainant continuing to occupy the premises after a temporary injunction was granted, the supplemental cross bill sought to recover the reasonable rental value for their occupancy. Thus the issues centered in the question of fact whether complainant had violated the terms of his lease, whatever it was, without the lessor's acquiescence. The findings on the issues being adverse to complainant's contention and in support of defendant's, the relief sought by the latter followed as a logical result.

In the oral argument before this court it was the contention of plaintiff in error's counsel that the question of the right to compensation for complainant's use of the premises was not involved. This contention was based on the claim that a case for equitable relief was not made out by cross complainant. As before stated that is mainly a question of fact. There was no contention, however, that the decretal judgment was not properly allowed if the equities on which the cross bill was founded were maintained. Complainant did not demur to the cross bill and though he did to the supplemental cross bill, he took issue thereon. He cannot properly question that they were not based on grounds for equitable relief. The points made in plaintiff in error's written argument are grouped under twenty different heads. They embrace claims of error in not finding and decreeing for complainant, in granting relief to cross complainant, in overruling and not sustaining objections to the master's report, in holding that the equities were with defendant and not with complainant, in holding or not holding certain specific allegations had been proven and were true, in making specific findings involving the matters we have already considered, and in legal conclusions of the decree which we have already discussed. We cannot review these various contentions in detail without extending this opinion to unreasonable length. Nor is it necessary. Suffice it to say that in the elaborately argued contentions we do not find good reason for reaching any different conclusions as to the respective rights and equities of the parties herein under the pleadings and evidence than what we have already stated. To discuss them would involve a repetition of much that has already been stated, and a lengthy analysis of testimony that we do not think sufficient to change those conclusions. As before stated, the issues are simple

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and hang mainly upon the pivotal facts referred to upon which the findings of this court on the former appeal and of the master and the chancellor on a full hearing are adverse to plaintiff in error's contentions and we find no reasonable ground for disturbing them.

The decree is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

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33271

J. T. FLEMING, trustee,
Appellee,

v.

CHARLES A. STRAINMANN and
ROSA M. STRAINMANN,
Appellants.

25
APPEAL FROM MUNICIPAL
COURT OF CHIC GO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action to recover upon two notes for \$1500 each brought by an assignee and endorsee thereof against appellants, the makers, who are husband and wife.

On the trial plaintiff offered the two notes in evidence and rested. In support of their affidavit of merits defendants offered certain evidence which was excluded. There was a directed verdict for plaintiff, and defendants appealed.

The notes were dated at Bradenton, Fla., and in the absence of any evidence to the contrary were presumably executed there and made with reference to the laws of that state. (Bronte v. Leslie, 30 Ill. app. 236; Forsyth v. Barnes, 234 Ill. 336.) It being claimed as a defense that the notes were void as to the wife under the Florida laws, the court under section 54 of the Municipal Court Act (Cahill's Stat., ch. 37, par. 447) took judicial notice of and incorporated in the bill of exceptions sections 1 and 2 of the Florida constitution and one of its statutes. Said section 1 is to the effect that a wife's separate property shall not be liable for the husband's debts without her consent given in writing according to the law respecting conveyances of married women.

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The second section states in what instances her separate property may be charged in equity and sold. The statute referred to provides that a married woman may become a "free dealer" as to her separate property by applying in chancery for a license to take charge of and manage her own estate and property.

These provisions would seem to indicate that in respect of being charged with liability for the debts of her husband and for which her separate property may be held the wife in Florida is still under the common law disabilities to enter into a valid contract unless in the former case it be by a writing in the form specified in said section 1, or in case of an attempt to charge her property in equity there is a showing that she has been duly licensed as provided for in said section 2. There was no attempt to show that the wife had done anything that removed her from the protection of either of these constitutional provisions. While this is not a direct proceeding to reach her separate property it would have that effect were the judgment permitted to stand and an execution were issued thereon. We do not agree with appellee that without the introduction of the entire Florida statutes in the record or other provisions therein that were not called to the court's attention for incorporation in the record so that we may have notice of them, we may indulge the inference that there may have been other statutory provisions that removed the wife's common law disabilities. However, even if the Florida laws incorporated in the record do not affirmatively show a married woman's incapacity to contract in other respects they do not show her capacity to contract generally, and inasmuch as in the absence of proof to the contrary, the common law will be presumed to prevail in a sister-state, and at common law contracts of a feme covert are absolutely void (Forsyth v. Barnes, supra), we must assume that the common law is

in force in Florida and hence the judgment against Mrs. Steinmann cannot stand and, therefore, is also erroneous as to her husband. (id.) In Dollner, Potter & Co. v. Now et al., 16 Fla. 86, and Hodges v. Price, 18 Fla. 342, the court said: "The conclusion we reach upon principle and authority is, that the wife's promissory note is not effective to bind her person either at law or in equity, and that neither the constitution nor the statute gives her to this extent the power of feme sole." and we are fortified in this construction of the Florida law as incorporated in the record by the opinion of the Supreme Court of Florida in Val.-Car. Chem. Co. v. Fisher et al., 58 Fla. 377, 386, where it is said: "This court has been committed to the doctrine that a married woman's note is void since the case of Hodges v. Price, 18 Fla. 342."

It was, therefore, pertinent to a knowledge of the transaction whereby Mrs. Steinmann sought to bind herself by signing said notes that the court should have received in evidence proof of the entire transaction consisting of a deed of real estate "to Charles Steinmann, trustee," and a mortgage given thereon in which she joined, securing the notes in question. It appears in her acknowledgment of the offered mortgage that she executed the same solely in her capacity as wife. We think these excluded documents tend to show that the transaction was not one pertaining to her separate property, and that the notes in question were given for a debt of the husband.

For the error in not receiving these documents in evidence we think the judgment should be reversed as to her and, therefore, must be as to both appellants because from the nature of the case it cannot stand against one alone.

It is also urged as a defense that the notes were procured by fraud of which plaintiff had notice. To sustain such defense

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defendants sought to show that there was such a disparity between the contract price of the land and its real value, for which the notes were given, as amounted to fraud, and that plaintiff had full notice thereof. The offered proof tended to show such disparity as might under the decisions of this state raise the presumption of fraud (Schwartz v. Demnick, 257 Ill. 479; Holan v. Lager, 266 Ill. 39), and such knowledge of plaintiff in taking the notes as amounted to bad faith. I think such proof was erroneously excluded and was admissible under sections 55 and 56 of the Negotiable Instrument Act. It had a tendency to show a defective title to the notes under such circumstances as amounted to a fraud. Whether the evidence excluded on that question would have been such as to cast the burden on the holder of the note to prove that he was a holder in due course, as is provided under section 59 of the Negotiable Instrument Act, it is unnecessary to consider.

But to offset the presumption that plaintiff was a holder in due course appellants urge that the court erroneously denied them the right to obtain evidence from plaintiff himself in answer to certain interrogatories directed to him, which they asked to have filed pursuant to section 32 of the Municipal Court Act. The court denied defendants' motion to require plaintiff to answer certain of said interrogatories, answers to which, I think, could bear directly upon the issues of the case, particularly his knowledge or notice of alleged fraud in procuring the notes. The plaintiff did not testify, and was not obliged to, I think the refusal to require his answers to such interrogatories resulted in defeating the purpose of the statute. It is no answer to say defendant might have taken his deposition. The questions were pertinent to the issue. The competency of the answers could have been determined at the

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research. It also mentions the scope of the study and the limitations of the research.

2. The second part of the report is a literature review. It discusses the previous studies on the subject of the study. It mentions the findings of the previous studies and the gaps in the knowledge.

3. The third part of the report is a description of the research methodology. It discusses the research design, the data collection methods, and the data analysis methods.

4. The fourth part of the report is a presentation of the research findings. It discusses the results of the study and the conclusions drawn from the findings.

5. The fifth part of the report is a discussion of the research findings. It discusses the implications of the findings and the suggestions for further research.

6. The sixth part of the report is a conclusion. It summarizes the main findings of the study and the overall conclusions.

trial.

So far as rejected proof merely had a tendency to show a partial consideration we are not prepared to say that it was error to exclude it, but so far as the same tended to prove procuring the notes under circumstances of fraud, we think it was error to reject it.

Accordingly the judgment is reversed and the cause remanded.

RE VERDICT AND REMAND.

Gridley, P. J., and Scanlan, J., concur.

33289

GLADER, Incorporated,
Appellant,

v.

C. J. KENNELLY,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On a hearing of the evidence before the court produced by complainant - none being offered by defendant - on the bill of complaint herein, the answer and replication, the bill was dismissed for want of equity, and complainant has appealed.

The bill is predicated on the alleged violation of a negative covenant in a contract of employment entered into between complainant as employer and defendant as employe whereby the employe agrees that he will not for twelve months after leaving the employ of the employer engage in or become interested in, directly or indirectly, as individual, partner, stockholder, etc., or in any other relation or capacity whatsoever, in or about the business of employment agency, other than that of the employer, within the City of Chicago.

Material facts averred in the bill, and admitted by the answer, are that complainant is engaged in business as an employment agency in Chicago and has built up a considerable business and clientele at considerable expense, and compiled extensive records and lists of applicants for positions and names of individuals and corporations desiring employes, who made requests therefor either over the telephone or by mail; that defendant was employed by the

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1. The purpose of this document is to provide information regarding the activities of the [redacted] organization.

2. The information contained herein is classified as [redacted].

3. The [redacted] organization has been active in the [redacted] area for several years. It has been found that the organization is engaged in a variety of activities, including [redacted].

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complainant as "placement man," who took such requests over the telephone or interviewed employers applying for employes and applicants for employment; that the contract in question was entered into April 14, 1928, wherein defendant agreed as aforesaid, and that he left the employment of complainant September 15, 1928; that on or about September 24 he entered into the employment of another employment agency in Chicago conducted by certain copartners.

The bill further alleged that defendant had and was allowed free access to all such mailing lists, records, data and other memoranda pertaining to the business; that complainant disclosed to him "information, ideas and suggestions so that he might use the same in his capacity" as such employe for complainant's benefit; that he became skilful in the business of employment agency; that such information "was and is secret and confidential," and was so understood by him; that he conspired with the copartners of the employment agency by whom he was subsequently employed as aforesaid, to acquire and use said lists, records, etc., of complainant for their own benefit and to organize competition against complainant; that defendant without authority or permission from complainant and without its knowledge or consent took from the files of complainant large numbers of records, memoranda, mailing lists, etc., filed or kept for use in complainant's business; that defendant did from time to time make "unauthorized and wrongful disclosures" to his new employers in disregard of his undertakings and duties; that since entering their employ he had been using said mailing lists and other data pertaining to complainant's business, thereby seeking to divert the business of complainant's customers, etc., from complainant, to its irreparable damage.

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which is well known to all who are familiar with the country. It is a fact which is well known to all who are familiar with the country. It is a fact which is well known to all who are familiar with the country.

In his answer defendant took issue on these several averments. He further alleged that the so-called records consisted chiefly of card indexes, showing the names of prospective employers, kind of services required, and the amount of salary paid; also the names of various employees and information relative to their ability, experience, etc., and that the data so acquired by complainant were obtained largely in soliciting employers and employees over the telephone; that other employees had similar lists and records; that it is not the practice of employers and employees to list themselves with any one employment agency in the City of Chicago, but, on the contrary, with several employment agencies therein; that the data contained in said records, etc., are not confidential or secret but in fact ^{such} as are furnished to, and duplicated in the records and lists of, many other employment agencies operating in the same city in the same way.

The answer further alleges in substance that he was in the employ of complainant prior to the execution of such contract, the terms of which were no different than those under which he was so employed except as to the requirement aforesaid that he would not engage in the service of any other employment agency within twelve months after the termination of his contract, which by its terms was terminable at any time by either party, and that he was required to sign and execute said contract or leave complainant's employ; that there was no consideration or thing of value given for its execution; that the services he rendered were not special, peculiar or personal, and that there are hundreds of other men and women in Chicago acting in the same capacity with the same ability, capacity, knowledge and intelligence as that of defendant.

It is unnecessary to review the evidence in detail. office

it to say that the only attempt to establish the averments of the bill was by the testimony of complainant's president, bookkeeper, and another employe and two other persons who had secured employes through complainant. Their testimony was wholly inadequate to establish the averments of the bill. In fact that of complainant's president practically confirmed the averments in the answer as to the nature of the business, the method of acquiring it, the fact that there were at least ten other employment agencies who employed practically the same methods of getting business in Chicago, that both employers and employes had their names listed in several employment agencies at the same time, and that there was nothing in the nature of the business of a secret or confidential character. There was no proof of a conspiracy, or of irreparable injury, or that defendant removed any of the lists, records, etc., of complainant or made use of the same in the employ of his new employer. In fact, there was an entire absence of proof of any of the denied allegations of the bill.

We need not discuss the fundamental principles governing the right to relief in this class of cases. It is well established that an injunction against divulging information held by an employe will not be granted where it is not secret or confidential (Victor Chemical Works v. Hiff, 299 Ill. 532), nor to enforce restrictions that are unconscionable, oppressive or unfair (*id.*), or where the relief sought operates unreasonably to restrict trade or the right to pursue one's trade or employment. (Tarr v. Stearns, 264 Ill. 110). It is clear from the evidence that there is nothing in the nature of the information the employe received that was of a secret or confidential character or such as tended to injure complainant's business. It was such as most any one could obtain and which,

according to custom, probably was (except as to one or two employers) in the possession of other employment agencies. Nor was there anything in the nature of the business which required of the employe any special personal skill or knowledge. Many others held like positions and performed similar duties with other agencies. So far as the enforcement of the agreement not to enter into similar employment within the limits of Chicago is concerned it was also unreasonable in the extent of territory it covered, considering the vast area of such city and its great number of employers and employes. The restriction, therefore, sought to be imposed on the employe's further employment in the same line of business was not only unreasonable but unconscionable and unfair, and the evidence is not such as to support a claim for equitable relief.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

33298

AUTOMOBILE SUPPLY COMPANY,
Appellee,

v.

SCENE-IN-ACTION CORPORATION,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHIC GO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from the denial of a motion to vacate a judgment by confession entered upon a power of attorney contained in a lease from plaintiff to defendant.

The petition upon which it is based claims a constructive eviction and that the power of attorney was unauthorized.

The petition discloses that the period of the lease was from October 15, 1925, to September 30, 1928, and that defendant continued in possession of the premises until April 30, 1928, when it moved out and abandoned them. It alleges as grounds therefor the failure to furnish adequate heat and sufficient elevator service in accordance with the covenants of the lease. The judgment was for the rent for the remaining five months of the term, together with attorneys' fees.

As to the alleged unauthorized power of attorney it is enough to say that defendant having accepted the lease, taken possession of the premises thereunder, and paid rent pursuant to its terms for over two and one-half years with constructive knowledge of all its parts, it must be held to have ratified such authorization. The lease is a unit and must be ratified or rejected as a whole. (Morris v. Tillson, 81 Ill. 607.) "Under

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such circumstances it was not necessary that the lease be executed pursuant to proper action of the board of directors to make it binding upon the company." (Higbie Co. v. Charles Weegman Co., 126 Ill. App. 97.)

As to the alleged breach of covenant to furnish sufficient elevator service the petition does not state when it occurred or how long it continued or that it existed at the time or reasonably near the time of abandonment. Hence the facts alleged with respect thereto are insufficient to show a constructive eviction at the time the premises were abandoned and afforded no legal defense. (Tiffany's Landlord & Tenant, Vol. 2, p. 1263.) "Possession retained after an alleged constructive eviction is a waiver of the right of abandonment." (Barrett v. Boddie, 153 Ill. 479; Lieferman v. Osten, 167 id. 93.)

Nor does it appear from the facts set up in the petition that defendant was justified in abandoning the premises on account of the breach of the covenant "to furnish steam heat during the ordinary business hours of the heating season." As stated they do not support a constructive eviction. In substance the petition states that during cold days in November and December, 1927, the rented premises were without heat for several hours, thus rendering them uncomfortable and untenable for the purposes for which the premises were rented, and that plaintiff did nothing to remedy the matter after complaint thereof; that on February 20, 1928, the temperature was below 50 degrees until after 10 a. m., and petitioner then served notice that because of "failure of plaintiff to comply with the terms of the lease" - whatever such failure was - it would terminate and cancel the lease on April 30; and that on many days during February and March the temperature was below 50 degrees, and again on April 9, 1928, until after 11:30 a. m. From this state-

ment of facts it does not appear that defendant abandoned the premises because of the alleged wrongful acts of the landlord or that he made any further complaint after February 20, when he served such notice. He could not, however, by retaining possession until April 30 avail himself of such notice and fix a time for his own convenience for leaving the premises. It has frequently been said that possession after an alleged constructive eviction is a waiver of the right of abandonment. The tenant can not avail himself of past breaches after he has waived them. If it be conceded that defendant may have had cause for abandoning the premises after complaints made in November and December, yet it not only retained possession of the premises up to February 20, but apparently without complaint in the meantime. And if it be conceded that defendant was entitled to abandon the premises for subsequent breaches on certain days in February and March and on April 9, nevertheless defendant was fit to retain possession of the premises up to that season of the year when little heat is required for comfort and close to the period when the ordinary heating season ends. If a tenant relies on a constructive eviction to warrant abandonment of the premises he must act promptly and within a reasonable time else he will be deemed under the authorities cited to have waived the eviction. The facts in this case are not materially different from those in the case of Kinn v. Lyde, 246 Ill. App. 26, where said principles of waiver and the necessity of the tenant's acting promptly on the claim of constructive eviction were adhered to.

The petition states that defendant surrendered the keys to plaintiff but it does not state that plaintiff accepted a surrender of the premises nor state facts warranting such an inference. In the absence of a showing that the premises were

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abandoned by reason of the fault of the landlord the latter had the right to re-enter and take possession of the premises. (Marshall v. Gross Clothing Co., 184 Ill. 421.) Accepting the keys for such purpose did not constitute an acceptance of the premises and a release of the tenant from payment of further rent. (West Side Auction Co. v. Conn. Ins. Co., 186 Ill. 186.)

In contending that defendant was entitled to a trial by jury appellant fails to recognize that the question before the court was whether there should be a trial at all; in other words, whether the alleged facts stated a legal defense. The court, in our judgment, properly decided that they did not, and there is nothing in the record to indicate that it abused its discretion in denying the motion.

The judgment is affirmed.

APPEAL.

Gridley, J., and Scanlan, J., concur.

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Journal of Management Studies, 36(7), 809-826.

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Journal of Management Studies, 19(1), 67-80.

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In the matter of the estate of
KASPAR G. SCHMIDT, deceased,
GEORGE W. KELLNER and TALITHA
H. KELLNER, as executors of the
last will and testament of
BARBARA E. KELLNER, deceased,
Appellants,

v.

GEORGE K. SCHMIDT, individually
and as executor of the last will
and testament of KASPAR G. SCHMIDT,
deceased,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal raises the question whether there was a compliance with the mandate of this court issued pursuant to our opinion in Wahl v. Schmidt, 237 Ill. App. 372. It was recognized that the only controversies involved in that appeal were the claims and interests of appellee herein as executor on one side, and those of appellants herein on the other side. (p. 379.)

Under the will of said Kaspar G. Schmidt, deceased, his four children, George K. Schmidt, appellee herein, and his three daughters, Mrs. Barbara Kellner, (whose interests under the will are represented by appellants herein), Mrs. Edna Wahl, and Mrs. Katherine Herbert, were to share in the final distribution of the estate one-fourth to each after adjusting "irregularities" existing by reason of advancements. It having been recognized by the briefs of the parties that the claims of Mrs. Herbert and Mrs. Wahl had been settled, the real matter for decision was the correctness of the account as to the amount of the Kellner distributive share. Deciding that question involved determining the correctness of disputed charges against the executor and the

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amount of advancements with which the Kellner share should be charged, including the excess payment of income on the same. On review of the case the decree of the Circuit court entered December 22, 1923, was reversed as to certain items, including all items referring to advancements made to Barbara Kellner, to excess payments of income thereon, and to over-payment to her of partial distribution and interest thereon, and certain items charged to the executor which on the restatement now before us have been deducted from the balance in his hands and are no longer in controversy.

The advancements and excess payments of income and over-payment on partial distribution to Barbara Kellner so referred to consisted of "advancements specified in the will (cash \$6,000 and Brewery stock \$460.70), totaling \$6,460.70, excess payment of income on amount of such advancements for the period from 12-10-99 to 12-10-14, \$4,851.24" which were deducted from the Kellner distributive share in the decree of the Circuit court of December 22, 1923.

In our decision it became necessary on the restatement of the account to charge the Kellner estate with advancements of \$37,360.30 instead of \$6,460.70, thus requiring a new computation to determine the excess payment of income on such advancements for the same period it was computed before, namely, the 15 years from December 10-99 to December 10-14. In the restatement such excess payment was figured at the rate of 5 per cent on the amount of such advancements for such period. Appellants contend that there is no basis for figuring it at that rate of per cent but that it should be figured at the actual rate of income of the estate of Kasper G. Schmidt, deceased, during the period in question. On the other hand, appellee replies to the effect that because the sum of

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\$4,851.24, being at the rate of 5 per cent per annum for such period, was taken at the amount of the excess payment of income to Mrs. Kellner at the time of the entry of the decree of December 22, 1923, and as no complaint was made thereon on the appeal to this court, 5 per cent was adjudicated as the proper rate in determining the excess income and is no longer open to controversy.

Bearing upon this question and what should be the amount of the distributive share to appellants the parties entered into a stipulation inserted in the decree, now appealed from, that

"First: George K. Schmidt settled with Edna S. Aahl for her share of the Kasper G. Schmidt estate before December 22, 1923, and that subsequently thereto, Mrs. Aahl assigned to him her claim to any further moneys that might be due her by reason of any change in the Kellner advancements. * * *

Second: That George K. Schmidt settled with Mrs. Herbert for her share of the Kasper G. Schmidt estate within two months of December 22, 1923, without obtaining such an assignment.

Fifth: That shortly before December 22, 1923, it was orally agreed between * * * counsel for the Kellner executors, * * * counsel for Mrs. Herbert, * * * counsel for George K. Schmidt, in a conference held outside the presence of the court, that for the purpose of fixing the excess payment of income on advancements to Mrs. Kellner and Mrs. Herbert, and for the purpose of expediting the entrance of the decree and using the amount of \$6480.70 fixed by the court as advancements chargeable to Barbara S. Kellner, over the objection of George K. Schmidt, and without prejudice to his right to insist that said advancements should have been fixed at the sum of \$37,360, \$4851.24 would be taken at the excess payment of income on account of such advancements, for the period from 12-10-99 to 12-10-14, which would be at the rate of 5 per cent per annum, and thereupon such figure of \$4851.24 was incorporated in the decree, and approved by the court without evidence or argument."

The matter in controversy before this court on the prior appeal with respect to advancements to Mrs. Kellner was the amount thereof and not what rate the excess income should be computed. It is apparent from the stipulation that the reason no question was

raised as to such rate was because the parties had merely agreed upon the amount at which the excess income should be figured on the basis of an advancement of \$6,460.70, evidently to dispense with the necessity of proof of the true rate of income earned by the estate and thus to expedite for the convenience of the parties the entry of the decree. That as an original proposition the true rate of income earned by the estate should be the proper rate in determining the excess income on such advancements can hardly be questioned. That it would involve a large amount of testimony to ascertain is evident from the numerous and complicated items of the account extending over such a long period. It is apparent to us that the purpose of such agreement in fixing the excess income at \$4,351.24, a comparatively small sum, was to obviate the necessity and expense of proof of the true rate, because the expense might equal or exceed the difference between that rate and five per cent. We find nothing in our opinion that indicates any intention to decide upon a rate for computing excess income. While the rate was not raised as a subject for discussion on the appeal to this court, it does not follow that it was adjudicated, especially in view of the construction we place upon such stipulation. Accordingly, differing, as we do, from the contention of appellee that it is too late to reopen the matter, it becomes necessary, as requested by appellee in that event to refer the cause back to the Circuit Court to take testimony as to the rate earned by the estate during such period, unless the parties agree upon the same; and to end this long and bitter litigation we cannot refrain from saying that such an agreement ought to be made.

In the original decree of December 22, 1943, after ascertaining the one-fourth for distribution to each of the heirs, there was added to the estate of Barbara E. Kellner, the following:

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"Under payment of partial distribution \$6703.12; interest thereon at 5 per cent from 10-15-15 to date, \$2,742.77." No question was raised as to the correctness of this item on the prior appeal, but upon the restatement no interest on said underpayment is allowed. The effect of our opinion was to affirm the decree with respect to this item and thus allow interest on said underpayment, as aforesaid, to the date of the final decree. It is not now open, therefore, for readjudication.

It is contended by appellants that as appellee has settled with everyone but Mrs. Kellner's estate, then by reason of such settlement the Kellner estate is entitled to credit for either one-half or three-fourths of the advancements charged against it instead of one-fourth as has been charged upon the restatement of the account. As before stated, it was recognized on the prior appeal that the matters there presented related only to the claims and interests of the executor on one side, and the legal representatives of Barbara Kellner, deceased, on the other. That appeal did not deal with George K. Schmidt individually but only as executor. It appeared from the briefs then before us that there had been a settlement with Mrs. Ahl and Mrs. Herbert. The terms of their settlement and their effect were not before us for consideration. It appears from the stipulation aforesaid that the settlement with Mrs. Ahl was before the decree of December 22, 1933, and that with Mrs. Herbert afterwards, but before the appeal came up here for consideration. As the amount of the advancements to the Kellner estate was one of the questions in controversy a change therein was bound to affect the amount of the distributive shares to each of the devisees under the Kaspar G. Schmidt will, and their individual shares might be affected one way or another by the

settlement so made with Mrs. Ahl. It was a question, therefore, that could have been raised upon the prior appeal. It was not, and we think the matter is not now open for consideration. As the settlement with Mrs. Herbert was made after the decree of December 22, 1943, any effect it may have had upon the distribution could have been raised by a writ of error and could have been considered in connection with the prior appeal. We think the decree appealed from is in accordance with our mandate except as to the rate at which the excess income should be figured on the Barbara Kellner advancements and except in the failure to allow interest on said underpayments to Barbara Kellner, as aforesaid.

Accordingly the decree will be reversed and remanded with directions for a restatement of the account in conformity with the views herein expressed.

REVERSED AND REMANDED.

Gridley, J., and Canlan, J., concur.

2531/A. 320

33319

CHARLES FORMAN, trustee,
and ELI METCOFF, a bondholder,
Appellees,

v.

FRED BECKLENBERG et al.,
Defendants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

On appeal of SOL RUBIN.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure of a trust deed securing a bond issue of \$140,000 on a certain apartment building in Chicago. The appellant, Sol Rubin, is the owner of the equity redemption.

The deed, dated May 1, 1924, was executed by Fred Becklenberg to Charles Forman as trustee. It secured 257 bonds totaling said sum, bearing interest at 7 per cent per annum, and payable in amounts of \$2,000 semi-annually, commencing November 1, 1925. The deed required a deposit monthly with the George M. Forman Company of one-sixth of the semi-annual interest and principal to take care of the principal and interest maturing semi-annually. By a subsequent agreement bonds numbers 74 to 83 inclusive, each for \$1,000, were subordinated to the others so far as the application of interest was concerned.

Said monthly deposits were made regularly until May 1, 1926, and were duly applied towards the payment of all principal and interest that had by the terms of the deed fallen due to that date. But on November 1, 1926, there was a deficiency in the monthly deposits to meet all that fell due on that semi-annual date. After

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applying therefrom towards the payment of interest on all bonds except the subordinated bonds, the remainder was applied towards the payment of bonds then maturing, leaving a deficiency of \$2477.74, besides six months interest on the subordinated bonds. On September 7, 1926, the premises were sold for non-payment of the taxes for the year of 1925, in the sum of \$4,686.86, plus the penalty. The sale not having been redeemed demand was made on the trustee to elect to declare the entire bond issue due and payable, as provided for in the deed, and he so elected.

The bill was filed December 15, 1926 - and amended a few days later - by Charles Forman as trustee and Eli Metcoff as legal holder and owner of certain of the bonds, including said subordinated bonds, and prayed for a receiver and the usual relief in ~~xxx~~ foreclosure proceedings. In January, 1927, said Rubin filed a general demurrer to the amended bill, which was overruled, and on February 8, 1927, he filed his answer thereto. Exceptions were taken to certain portions of the answer and sustained. While on the hearing before the master to whom the cause was subsequently referred, evidence was introduced by Rubin tending to support the averments in the answer so excepted to, yet such evidence was improperly received, and in view of the ruling on the exceptions to the master's report must necessarily not have been considered. It is unnecessary, therefore, for us to consider appellant's argument so far as it is based on such portions of the record.

It appears that the master to whom the cause was referred died after having heard the evidence but before he completed his report. His successor certified a transcript of the evidence he found among the files of said master as a true, correct and accurate record of the proceedings had before the deceased master and returned

the same with all the exhibits and records produced before said master, including the briefs of the respective parties, and gave notice to the respective solicitors of the filing of the same with the court. Finding that the transcript of the evidence was a true and correct transcript of all the evidence adduced before the deceased master and that the proofs were closed before him, and that the arguments of the parties had been presented to him thereon, the chancellor allowed the same to be filed and to be considered and set the cause for hearing thereon, and denied the motion for Rubin to present additional proof on the hearing.

It is first urged that there was a misjoinder of complainants. This contention is based upon a provision in the trust deed which reads as follows:

"The exclusive right of action hereunder shall be vested in said Trustee until refusal on his part to act, and no bondholder shall be entitled to enforce these presents in any proceedings at law or in equity until after demand has been made upon the Trustee, accompanied by tender of indemnity as aforesaid, as hereinbefore provided, and said Trustee has refused to act in accordance with such demand."

It is alleged in support of the proposition that there is no allegation in the bill of the refusal of the trustee to act in accordance with the demand made upon him, accompanied by a tender of indemnity, and appellant cites Consolidated Water Co. v. City of San Diego, 92 Fed. 759; General Electric Co. v. LaGrande Edison Electric Co., 87 Fed. 590, and State ex rel. Bowling Green Trust Co. v. Barnett, 245 Mo. 99, 122, tending to support the proposition. While there is no direct decision in this State upon a like point, it is not uncommon in the absence of such a provision to join the trustee and legal owner of the notes as complainants in a foreclosure proceeding. Unquestionably both are proper and necessary parties to the proceeding (Rodman v. Quick, 211 Ill. 546.) In Hirsh v. Arnold, 318 Ill. 28, the point was made that it was improper to amend a bill

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1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

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of foreclosure filed by a trustee by making the cestui que trust also a co-complainant. The point was not upheld. To be sure, it was not predicated on a provision like that referred to in the instant case. It was said in Prindeville v. Curran, 156 Ill. App. 278, 286: "There is no importance to be attached to the position of parties in an equity suit as complainants or defendants, provided the proper pleadings are filed as a foundation for relief. The rights of the parties will be determined regardless of their position as complainants or defendants." In Higgins v. Lansing, 154 Ill. 361, where a suit to compel an accounting or to redeem stock of a corporation was brought without a demand on the corporation or its board of managers by an equitable owner of the stock the court said that "equity looks to the real interest of the parties, rather than to the position they may happen to occupy on the docket." In the case at bar, however, there was a proper demand made on the trustee even though it was not pleaded. If the point was well taken by demurrer as to either the failure to plead a demand on the trustee or because of such provision as to the trustee's exclusive right of action appearing on the face of the bill, yet on the overruling of the demurrer defendant pleaded over, taking issue and going to a full hearing on the merits of the bill. It appearing that he had no valid defense thereto and that the proof sustained the allegations of the bill upon which the right to foreclosure was predicated, and it further appearing that the interests of Metcoff as a holder of some of said bonds are not antagonistic to the interests or duties of the trustee to enforce the terms of the trust but are consistent with them, we do not think after a full hearing on the merits of the case the decree should be reversed upon this purely technical point. The same evidence would have been material if Metcoff had been made defendant. The provision in question was evidently not intended to

hinder the trustee from filing a bill to foreclose upon the request of bond holders because one of them was made a co-complainant instead of a defendant. The irregularity, if so regarded, did not deprive appellant of any legal or equitable right. Had the proceeding been instituted in the name of Metcalf alone without a proper demand upon the trustee or his refusal to act, a different question would arise.

It appears that Charles Ferman was a trustee in a good many bond issues promoted by the firm of which he was a member and left the formal and legal details in connection with collections for foreclosures and steps to be taken with reference to notice or demands for foreclosure to others under general directions to act in his name with regard thereto, and although the present action was taken pursuant to such directions without his personal knowledge of some of the details, we do not think it could be said that the proceeding was unauthorized. Appellant was in default as aforesaid and the right to foreclose by reason thereof had accrued, and on the merits appellant had no defense.

After the death of the master appellant sought to have the case re-referred, which the court refused to do, and as before stated, the chancellor read the complete evidence that had been taken by the deceased master and which had been duly reported upon due notice to the parties in interest without objection. There was no error in thus proceeding. (Coel v. Glos, 232 Ill. 141, 147; Amundson v. Glos, 271 Ill. 209, 211.

We fail to see any merit in the contention that complainant's solicitors also represented Fred Becklenberg. If they did we fail to see how it made any difference to appellant or affected his interests.

Nor do we see any good ground upon which to predicate the

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claim of fraud on the theory that appellant was of the opinion that the general taxes for 1925 were paid when he purchased the premises. We think the evidence clearly discloses that he knew the taxes were not paid when on May 1, 1926, the premises were conveyed to him.

The point is also made that the evidence fails to disclose that complainant Eli Metcalf has any real interest in the subject matter of the cause. He produced at the master's hearing all of said subordinated bonds and five of the others and testified that he purchased them and that they were not paid, and that he had made a demand upon the trustee to foreclose for the non-payment of interest and taxes. There was no proof that tended to rebut his ownership of the same.

It also fails to see that said subordination agreement which gave the other bonds better security affected appellant adversely or anyone except the owner of the subordinated bonds. The only effect it had was to postpone the lien of the latter to that of the other bonds. Besides appellant purchased the property with full knowledge that it was subject to an encumbrance of a bond issue of \$140,000.

The court made an allowance for solicitors' fees of 10 per cent of the amount of the indebtedness. Such an allowance was held reasonable in Eberly v. Commonwealth, 131 Ill. 445. Its reasonableness and fairness were testified to for complainant. No counter proof was offered. In view thereof and of the fact that the defenses made are technical and obstructive in character we cannot say the allowance was unreasonable.

It is also urged that the provision in the trust deed for six equal payments of both principal and interest on the first of each of the six months next preceding maturity of the respective

interest and principal payments constitutes usury. The intent of the provision is declared in the deed to be "that such aggregate deposit one month before the date of each semi-annual interest payment shall be sufficient to meet such interest payment when and as it matures, and such deposit, one month before the date of each semi-annual interest payment when and as it matures (except as to the payment of the portion of said principal falling due May 1, 1924, as hereinabove more specifically provided for.)" We construe the provision for these monthly deposit advances with a third party thus to take care of semi-annual installments of interest and semi-annual payments of principal maturing at those periods it is not usurious. It has been held not to be usurious to collect interest in advance so long as the total amount of interest charged does not exceed 7 per cent for the length of time for which the lien was made. (National Life Ins. Co. v. Donovan, 238 Ill. 283.) It does not appear the interest charged would exceed the legal rate, "But to be taken advantage of, usury must be pleaded." (id.) That defense was not made, the court in the exercise of a sound discretion not permitting appellant to amend his answer by setting it up as additional defense after the proofs had been closed. (Drew v. Drew, 271 Ill. 245, 247.) It was not therefore before the court as an issue, even if otherwise appellant having deducted the bond issue from the purchase price could avail himself of such a defense. (Hibernian Banking Ass'n v. Davis, 295 Ill. 337.)

We see no good ground in equity for a reversal of the decree. It is affirmed.

AFFIRMED.

Gridley, J., and Scanlan, J., concur.

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MAX L. GATT,
Appellee,

v.

FURKE'S STORAGE CO.,
a corporation,
Appellant.

253 L.A. 620²
APPEAL FROM MUNICIPAL
COURT OF CHIC. CO.

MR. JUSTICE BRANES DELIVERED THE OPINION OF THE COURT.

Plaintiff stored with appellant certain articles of furniture in July, 1926, and withdrew them from storage in April, 1927. He enumerates them in his statement of claim and alleges that when stored they were in perfect condition and when withdrawn they were torn, watercoaked and otherwise damaged. Defendant admitted the storage and alleged in its affidavit of merits that the goods were returned in as good condition as when they were received excepting one item, which was satisfactorily repaired at defendant's expense, and that an allowance was made of \$25 by defendant "for such other damages sustained by plaintiff," and that such settlement was and is an accord and satisfaction of all damages, etc., and that if the goods were damaged it was through no fault or neglect of defendant.

The case was heard without a jury and the court found for plaintiff and assessed the damages at \$204. The judgment thereon is appealed from.

The testimony is controverted on most every fact at issue, including the condition of the furniture when returned and the alleged neglect of the bailee, and whether there was an accord and satisfaction.



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If plaintiff had a cause of action we think the evidence furnishes no adequate basis for determining the amount of his damages. On that subject plaintiff introduced in evidence the wholesale cost of the various articles that he claimed were damaged, aggregating over \$1200. He used them for one entire year up to the time this suit was brought and then sold them to a second-hand dealer for \$60. There was no proof of their value in their alleged damaged condition before put to such use nor of their marketable value when sold to the second-hand dealer. It is impossible from the testimony to determine upon what basis the court assessed the damages or upon what basis they could be approximately assessed. For that reason we cannot affirm the judgment or determine what judgment, if any, should be entered here.

In view of that conclusion it would subserve no good purpose to discuss the weight of the evidence on the matters in controversy. Hence the case will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, D. J., and Scanlan, J., concur.

33341

E. B. JOOMAYA,
Appellee,

v.

E. YOHANNA,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for \$750 against defendant based on his claim for commissions of 10 per cent on rugs sold by defendant to E. Y. Baaba and his wife.

It is argued on this appeal that the verdict was manifestly against the weight of the evidence, and we concur in that contention.

Plaintiff was an insurance agent and an acquaintance of defendant and of the Baabas. Defendant is a dealer in oriental rugs. The evidence tends most strongly to show that in October, 1924, plaintiff saw in defendant's store two particular rugs on which defendant put the price of \$400 each, and suggested to defendant that he might bring a customer for them and that defendant should charge .90 therefor and give him \$100 for bringing in the customer in case of a sale at that price; that an agreement was then made to that effect but that there was no agreement for any particular commission, and that the agreement related wholly and solely to the sale of said two rugs.

It appears that he induced the Baabas to inspect the rugs but they decided not to take them and did not purchase them; that subsequently in May, 1925, one Cara, with whom the Baabas had listed their real estate for sale, negotiated a contract for exchange of the real estate for \$9,000 worth of defendant's rugs, which was consummated; that in the following August plaintiff learning of

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the same made claim for commissions on the sale of rugs taken in exchange to the value of \$7500. We think the preponderance of the evidence is to the effect that whatever arrangement plaintiff had with defendant related only to the two rugs referred to and that he was not the procuring cause of the contract for the exchange of properties as aforesaid and had nothing to do therewith, and therefore was not entitled to commissions on the rugs given in such exchange.

Accordingly the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

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33350

HORWITZ & LORTMAN,
Appellees.

v.

MYRON A. WISCH,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from the overruling of a motion by defendant to vacate a judgment entered against him by confession on his two notes payable to plaintiffs' order.

The motion was made in due time and based upon a petition setting forth the facts and circumstances of the giving of the notes, which if true, clearly import that they were merely accommodation notes and given without any consideration, and are still held by the payees.

Appellees' main argument is that the alleged facts and circumstances are unreasonable and improbable. They are not so on their face. That would be a matter for determination upon testimony adduced to establish them. They tend to show a legal defense, namely, that the notes were given without any consideration. Other grounds urged for sustaining the court's order are without merit and too captious for consideration.

The judgment will be reversed and the cause remanded with directions to open the judgment and permit defendant to plead his defenses.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, F. J., and Scanlan, J., concur.

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33109

PEOPLE OF THE STATE OF ILLINOIS,
 ex rel. GEORGE GARY,
 Appellee,

v.

WILLIAM HALE THOMPSON, Mayor of
 the City of Chicago, MORRIS ELLER,
 City Collector of the City of
 Chicago, and PATRICK SHERIDAN SMITH,
 City Clerk,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

People of the State of Illinois, ex rel. George Gary, filed, in the Circuit Court of Cook County, a petition for mandamus against William Hale Thompson, Mayor of the City of Chicago, Morris Eller, City Collector, and Patrick Sheridan Smith, City Clerk. The cause was heard by the court without a jury and at the conclusion of the evidence the court found the issues with the relator and entered judgment awarding a writ of mandamus as prayed. This appeal followed.

The petition alleges (inter alia) that the relator is a person of good moral character and the owner of the dancing academy at 525 South State street, Chicago; that there are in full force and effect in said city certain ordinances (set out in full) that define "dancing schools" and provide for the issuance of licenses for said schools; that on May 1, 1928, a license was issued to said relator "to give entertainment of the fifth class" at the said place for a period of six months ending June 30, 1928, "and that without any legal cause as prescribed under the Ordinances hereinbefore mentioned, the said license was revoked;" that since said revocation the police of said city have on several occasions

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WILLIAM H. HARRIS, Mayor of
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City Collector of the City of
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entered the said place "and compelled him to desist from carrying on his said lawful business and said dancing instructions;" that on several occasions the said police have arrested the relator, and that said unlawful conduct of the police "has worked a hardship on the said petitioner in depriving him of his means of livelihood in his chosen vocation;" that the relator has not at any time "violated any of the laws of the land, either federal, state or municipal, and is in no way connected with any person or persons who did violate any of the laws of the land under these premises or any of them;" that on June 25, 1928, "he made application with the City Clerk of the City of Chicago for an amusement license, a proper tender of the money of said license fee was made, the application was disapproved, the tender of money refused and no license issued to him * * * that he has made written demand upon said Mayor to issue said license and same was refused and no reason was given for said refusal; * * * that the action of the defendants, herein, in refusing to grant him a license is arbitrary, wrongful and without legal execution," and the relator prays that a writ of mandamus issue against the said defendants, "demanding said superintendent of police to forthwith approve the application of your petitioner to conduct a dancing school at 525 South State street, Chicago, Illinois, and that the said William Hale Thompson, Mayor of the City of Chicago, be directed to forthwith grant said license to your petitioner, and further asking that the said Collector thereupon issue the same and that the said Clerk of said City, issue to your petitioner such license for the conduct of a Dancing academy," in the said premises. The defendants answered (inter alia) that the relator was not a person of good moral character and reputation, and asserted "that on divers occasions the petitioner herein has violated the law and the city ordinances and has conducted his place in a manner that per-

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mitted shameless debauchery, immoral dancing that tends to degrade public morals, and has permitted indecent, vile and degrading acts in the conduct of his business in violation of the ordinances of the City of Chicago and statutes of the State of Illinois * * * and that such facts having been presented to the Mayor the petitioner's license was revoked in accordance with the provisions of the ordinance hereinabove referred to, and that because of such facts, the petitioner is not a fit and suitable person to have a license."

The relator applied for a license under certain ordinances of the City of Chicago that define "dancing schools" and provide for the issuance of licenses for the same. A dancing school is therein defined as "any building, room, enclosure, premises, place or establishment in the city of Chicago where instruction in the art of dancing or dancing lessons are given and where a charge or fee for such instruction or lessons is made, paid or received." The ordinance also provides that where an applicant has complied with certain provisions (therein stated), "the mayor, in his discretion, shall cause a license to be issued to such applicant," Chapter XLIV of the Municipal Code deals entirely with the subject of licenses, and by section 2425 of said chapter the mayor is given the power to issue a license to such person or persons as shall comply in all respects with the provisions of the ordinances "and as the mayor in his discretion shall deem suitable or proper persons to be licensed," and section 2411 grants power to the mayor to revoke a license where any department head shall certify to him that the licensee is violating any of the ordinances of the said city or any of the statutes of the state. The trial court, as appears from the opinion rendered in deciding the case, had doubts as to whether the mayor, in revoking the license of the relator, had proceeded according to the provisions of the ordinance in question. We are unable to see

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how that was a material question in the case. The prayer of the petition is that the city officials be commanded to approve the application of the relator to conduct a dancing school in the premises in question and to issue a license to him for the conduct of a dancing school, and the judgment of the court commanded the superintendent of police to approve the application of the relator for a license for a "dancing academy" and commanded the mayor to grant such a license to the relator, and the sole question for determination was: Did the facts clearly show that the mayor had abused his discretion in refusing the relator a license?

It is the settled law of this state that to justify the granting of a writ of mandamus the relator must show, by averment and proof, a clear right to the writ. Under the ordinances in question the mayor was given a discretion in the matter of causing a license to be issued to an applicant. Where discretion is invested in an official his decision, whether correct or erroneous, cannot be controlled by a writ of mandamus unless it is shown that he has acted fraudulently or corruptly. (People v. Henry, 236 Ill. 124, 127. Other cases to the same effect might be cited.) It has also been held that the action of an official in refusing a license must not be arbitrary, and if the discretionary power reposed in him is exercised with manifest injustice, the courts will interfere when it is clearly shown that the discretion has been abused, and the relator relied upon this rule of law upon the trial of the case, where he contended that the mayor had abused the discretion given him. The trial court and the counsel for the relator and the defendants agreed that the sole issue was: Was the relator conducting "an immoral place?" and a number of witnesses were called by both sides who gave evidence bearing upon that issue. After a very careful

study of the record, we have reached the conclusion that the evidence clearly shows that the relator conducted in the premises in question an immoral dance hall. The proof demonstrates that the claim of the relator that he was conducting "a dancing academy" was a mere pretense. Counsel for the relator states in his brief that he "deeply regrets that a case containing such testimony should ever besmirch the volumes of the Appellate Court of our state," and we feel that a decent regard for the records of this court prevents us from stating the facts and circumstances that have forced us to the above conclusion. We are of the opinion that when the evidence for the relator is carefully analyzed, it tends strongly to corroborate the theory of fact of the defendants that the relator was conducting an immoral dance hall. The trial court, in his opinion, made the following statement: "If it was in my power to determine what is proper dancing and what is not proper dancing, I would have no difficulty at all in saying to the officers of the City of Chicago, that I shall not interfere with their discretion in refusing these places a permit where there is a type of dancing that is complained of here. They may very well remedy that situation. If they want revenue from these places, if the City is in such need of revenue that it must license these places, let them pass an ordinance that will define the type of dancing that shall be permitted or prohibited, and then the courts can act. There being nothing in the law to define it, I cannot set up my standard of what is right and wrong for what the law fails to do." A licensee under the ordinance in question would have the right to conduct a "dancing school" in a lawful manner. While we are satisfied that the kind of "dancing school" intended by the ordinance is not to be determined from the viewpoint of the prude or the prurient, nevertheless, in a case like the present one, where

the proof shows a dance hall conducted in such a manner as to shock and offend the moral sensibilities of the average person of normal, wholesome mind, we find no difficulty in holding such dance hall an immoral place. It would be, of course, an idle argument to contend that the relator would have a legal right to conduct such a place, under the ordinance in question. In the present case, the evidence shows immoral conduct by the servants and patrons of the dance hall, apart from that connected with the dancing.

The relator, in conclusion, contends that as the bill of exceptions fails to show any motion for a new trial or any exceptions to the judgment, the judgment must be affirmed. There is no merit in this contention. (See Climax Tag Co. v. American Tag Co., 234 Ill. 179, 182; City of Lewistown v. Harrison, 232 Ill. 461; Steel Equip. Co. v. Frenateel Co., 312 Ill. 359, 366.)

In our opinion the mayor would have been guilty of a grave abuse of power if he had granted a license to the relator. The judgment of the Circuit Court of Cook County is reversed.

REVERSED.

Grisley, J., and Barnes, J., concur.

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2. The second part of the report is a detailed description of the experimental work. It includes a description of the apparatus used, the procedure followed, and the results obtained. It also discusses the errors and the limitations of the experiment.

3. The third part of the report is a discussion of the results. It compares the results with the theoretical predictions and with the results of other experiments. It also discusses the implications of the results and the conclusions drawn from the study.

4. The fourth part of the report is a conclusion. It summarizes the main findings of the study and states the conclusions drawn from the results. It also mentions the suggestions for further work.

5. The fifth part of the report is a list of references. It includes the names of the authors, the titles of the papers, and the names of the journals or books in which the papers were published.

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33208

SAMUEL M. McDONALD,
Appellee,

25-14-321⁴
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

EMPLOYERS' LIABILITY
ASSURANCE CORPORATION,
LIMITED,
Appellant.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, Samuel M. McDonald, plaintiff, sued Employers' Liability Assurance Corporation, Limited, defendant, in an action in assumpsit. There was a trial before the court, with a jury, and a verdict returned finding the issues for the plaintiff and assessing his damages at the sum of \$3,000. Judgment was entered on the verdict and this appeal followed.

The declaration contained two counts, each of which alleged the issuance by the defendant to the plaintiff of the policy of "disability insurance" dated June 29, 1921. It further alleges that the policy contained (inter alia) the following clauses:

"If the insured suffers total accident disability, and/or total illness disability that immediately and continuously prevents the insured from performing each and every duty pertaining to his occupation, the Corporation will pay so long as he lives and suffers such disability a weekly indemnity of Fifty Dollars.

"Any one of the following, namely, - sunstroke, freezing, hydrophobia, or asphyxiation suffered through accidental means (suicide, whether sane or insane is not covered) shall be deemed bodily injuries within the meaning of this policy."

The first count charges:

"On, to-wit: the 6th day of June, A. . . 1925, to-wit: at the City of South Bend, County of St. Joseph, and State of Indiana, he suffered a sunstroke through accidental means, through and because of which the plaintiff sustained bodily injuries by reason of which said bodily injuries the plaintiff suffered total disability that immediately

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and continuously prevented the plaintiff from the date last aforesaid and thence hitherto, from performing any and every kind of duty pertaining to his occupation."

The second count charges:

"On, towit: the 6th day of June, . . . 1925, towit: at the City of South Bend, County of St. Joseph, and State of Indiana, the plaintiff became and was ill and diseased, and because of said illness and disease suffered total disability that immediately and continuously prevented the plaintiff from the date last aforesaid and thence hitherto, from performing any and every kind of duty pertaining to his occupation."

The defendant pleaded the general issue and filed an affidavit of defense in substance as follows:

"1. That at the time of the issuance of the policy and long prior thereto the plaintiff was sick and disabled.

"2. The plaintiff did not suffer a sunstroke, nor did he suffer any injury through accidental means, nor did he suffer bodily injuries, nor as a result of such injuries did he suffer total disability, nor was he prevented from performing any and every kind of duty pertaining to his occupation.

"3. The plaintiff did not become ill or diseased, nor because of such illness or disease did the plaintiff suffer total disability that immediately and continuously prevented the plaintiff from performing any and every kind of duty pertaining to his occupation.

"4. The answer of the plaintiff to question 14 in the copy of the application for the policy is in fact false and that plaintiff knew the same was false, and within five years prior to the making of the said application the plaintiff had suffered departure from good health; that upon discovery of the falsity of such answer, the defendant declared the policy void, and tendered return of the premiums."

The defendant contends and strenuously argues that the verdict is clearly and manifestly against the weight of the evidence and the motion for a new trial should have been allowed. After a very careful reading of the entire record we have reached the conclusion that this contention is a meritorious one and we will state certain salient features of the evidence that have caused us to reach this conclusion.

The plaintiff was fifty-seven years old at the time of the trial, and since he reached his majority had practiced dentistry in South Bend, Indiana, where the policy in question was issued. He served in the army during the Spanish-American war from June 23,

1898, until November 26, 1898. On August 26, 1918, he sent to the Commissioner of Pensions at Washington a letter in which he made an informal application for a pension. In that letter he stated that while he was in Camp at Port Tampa, Florida, he contracted camp diarrhoea, which developed into dysentery, and that as a result of the same he lost seventy pounds in weight and almost died; that his knowledge of medicine saved him; that later, while in camp at Fernandina, Florida, he still had the dysentery and that he there contracted malaria, which culminated in typhoid fever, from which he suffered severely for many weeks; that when he was furloughed home his intestines were so sore that he nearly died on the train from shock and jar; that when he reached camp in Indianapolis the regimental doctor found that he had a very weak heart; that since his army experience, "with all its sickness," he had never been in good health. In a "Declaration for Pension," signed by the plaintiff on March 20, 1924, he stated, "That he is suffering from a mental or physical disability of a permanent character, not the result of his own vicious habits, which so incapacitated him from the performance of manual labor as to render him partially unable to earn a support, to-wit: nervousness of the hands." Dr. Stoltz, a member of the United States Pension Board at South Bend, who examined the plaintiff on July 28, 1924, testified that the plaintiff at that time told the Board that his physical difficulties dated from the time that he had typhoid fever in the service and that he had tremors and shaking of the hands to such an extent that he could not perform his dental work. The plaintiff was then awarded a pension of \$15 per month, which was increased, in 1926, to \$72 per month. On January 23, 1925, the plaintiff was indicted on a charge of indecent exposure. He was well acquainted

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with the prosecuting attorney of the county and the latter finally agreed with the attorneys for the plaintiff and the latter's family that the prosecution would not be pressed against the plaintiff if he quit the dental business. Later the prosecuting attorney called at the old office of the plaintiff and found the latter there apparently engaged in practicing dentistry and the attorney stated to the plaintiff that the indictment was still pending and that he would bring the same to trial at the next term of court unless the plaintiff closed his office and quit business, and the plaintiff promised that he would close his office. On June 6, 1925, four months after the plaintiff's arrest on the said indictment, the plaintiff claims to have suffered a sunstroke and to have suffered total disability therefrom. On July 15, 1925, the plaintiff dictated to his wife a statement in reference to the sunstroke, and after he had corrected the same and signed it he sent it to the defendant company. Therein the plaintiff stated: ○

"On June 6th, 1925, I went to my office about nine o'clock in the morning and worked until five o'clock when I returned to my home for supper. It was Saturday and I keep my office open on Saturday evenings. Accordingly I returned to my office on June 6th, 1925, about 8:30 o'clock and worked in my office at 7:30 o'clock that evening. My wife was with me when I worked that evening. We called a Yellow Cab and upon leaving my office we entered the cab and directed the driver to take us to our home 681 West Street, South Bend, Ind.

"I felt well all of the time prior to entering the taxi cab. It had been an extremely hot day but the heat had not bothered me more than usual to every one. In a few days at that time about 700 deaths from sunstroke had been reported.

"As the cab started I noted that the cab was extremely hot, and hot waves of air blew into the cab, shortly after the cab started I began to feel dizzy and sick at my stomach with severe pains at the base of my brain which I still have and my condition since that time with its nerve exhaustion has produced a state of 'neurasthenia.'

"My wife who is a trained nurse was with me in the cab had me taken to our home, where she and the driver assisted me from the cab and she and my sisters rendered first-aid - and Dr. E.R. Borley was called the following morning. * * *

"I never suffered a similar attack and had no warning of the present one prior to entering the taxicab. I am still confined to my home under the care of my wife who is a graduate nurse and Dr. . . . Borley, getting out occasionally into the

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park or the porch of our family car for fresh air and exercise, and some recreation for self and wife, my constant attendant. My condition since June 6th, 1925, the date of the sunstroke has prevented me from performing each and every duty pertaining to dentistry, my occupation, and I don't know when I'll be able to again do any dental work." (Italics ours.)

On the trial of the case the plaintiff read the deposition of Mr. Borley, in which the latter testified (inter alia) that he had "never heard of a person getting a sunstroke riding a half dozen blocks in a taxicab after the sun was down." After the reading of this deposition the plaintiff testified that on the day in question he ate his dinner at home around noon and that he returned to his office about 1:45 p. m. and that while he worked very hard ^{the} ~~all~~ afternoon he had a feeling of nausea and dizziness, which came on immediately after he started to work in the afternoon; that he felt very ill at his stomach and had nausea several times and a very dizzy feeling, and sometimes he could hardly see, but that he would recover from that condition. "I felt like I was staggering around instead of going about normally. I began to lose control of myself, or felt that I was losing control of myself, and I telephoned to my wife and told her about my condition, and I thought she had better come down and get me and look after me and she did and took me home in a cab. During that afternoon I had very severe pains in the head, and in the spinal cord down to about the middle of the back. On the sides of the head, and it was particularly bad at the base of the brain; it seemed to be drawing, like there was a poultice on the back of my head and sides, just in the vicinity of the ears." The plaintiff read the deposition of O. E. Bryant, the driver of the taxi on June 6. This witness stated that the plaintiff "seemed to be all right when he got in the cab." Mr. Edgar E. Borley, who was called to attend the plaintiff on June 7, has known the latter for twenty years. He stated in his deposition, that on this date he

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gave the plaintiff a thorough physical examination "and found nothing definitely wrong at that time;" that he was extremely nervous and his condition demanded quietness and rest; that his urinalysis and his blood pressure were both practically normal; that he did exhibit some of the symptoms found in sunstroke - restlessness, nervousness, headache and mental excitement; that "it was in connection with some of these insurance things that was disturbing him more than anything else, he was carrying insurance policies and that was one of the topics of his conversation;" that he prescribed rest in bed and gave him a sedative, and that he "never heard of a person getting a sunstroke riding a half dozen blocks in a taxicab after the sun was down." During the examination of the witness the following occurred: "Q. Now, is that history he (plaintiff) gave you suggestive of sunstroke? A. Well, not entirely. * * * When we speak of sunstroke, it is usually a man who has been subjected to the severe rays of the sun, becomes exhausted and falls down. That is spoken of as sunstroke. Then you could take a man who is subjected to more or less heat, and there can be a disturbance of the nervous system and the heart centers and all that, and he might have his symptoms several hours after that. That would be about the only thing that I could attach to it, would be a heat prostration on a hot day, * * * he claimed he was overcome by the heat." Dr. Borley further testified: "After I began treating him the symptoms I observed were just nervousness symptoms and the fearfulness, being afraid. I don't recall any other symptoms." It is clear from a reading of the entire testimony of Dr. Borley that he did not find that the plaintiff suffered a sunstroke on June 6, and the doctor carefully refrained from expressing the opinion that the plaintiff suffered total disability as a result of heat prostration that immediately and continuously prevented the plaintiff from performing the duties of his occupation. The plaintiff testified,

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on direct, that from the time of the Spanish-American war until the date of the sunstroke the only time he required a doctor's attention was in 1916, when he called a surgeon to treat a cut that he received in the arm; that before June 6 he was a very hard worker and did not take any vacations; that he "was good and strong;" that he worked "sixteen hours a day easily;" that he "put in twelve, fourteen hours a day; that included Sundays too;" that in the middle of the year 1924 he had a slight nervousness of the hands that lasted about ninety days; that since the Spanish-American war he was in a state of good health excepting when he felt "a lack of pep." There was other testimony offered on behalf of the plaintiff and the defendant, but we do not deem it necessary to refer to the same. We are satisfied, after a careful consideration of the facts and circumstances in the case, that the plaintiff did not prove by a preponderance of the evidence that he sustained a sunstroke on June 6 or that he suffered total disability as a result of heat prostration on that date. The United States Pension Board found, long before the time in question, that the plaintiff was suffering from palsy. This condition undoubtedly interfered with the ability of the plaintiff to practice the profession of dentistry. After his indictment the state's attorney agreed not to press the charge against the plaintiff, on the promise of the latter that he would no longer practice his profession. As we read the record, the most reasonable conclusion that can be drawn from certain indisputable facts and circumstances in evidence is that when the plaintiff found himself barred from practicing the only profession that he had followed since his majority he determined to make a false claim that he had suffered total disability that prevented him from practicing dentistry, and that the alleged sunstroke of June 6 is but a part of this fraudulent scheme.

In our judgment it would be an injustice to permit the judgment in the present case to stand. The judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

33268

M. BECK, WALTER BECK, HOWARD BECK,
SIDNEY BECK and SYLVAN BECK, doing
business as L. Beck & Sons,
Appellants,

v.

CARRIE J. HINES,

Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

M. Beck, Walter Beck, Howard Beck, Sidney Beck and Sylvan Beck, doing business as L. Beck & Sons, complainants, filed their bill in the Circuit Court of Cook County against Charles J. Hines, Carrie J. Hines and Anna Journey, defendants. The defendants Charles J. Hines and Anna Journey were defaulted for want of appearances, and after answer filed by the defendant Carrie J. Hines and evidence heard, the chancellor dismissed the bill for want of equity, and the complainants have prosecuted this appeal. The defendant Carrie J. Hines has not filed a brief in this court.

The bill alleged that the complainants, on January 12, 1928, recovered a judgment in the Municipal Court of Chicago against the defendant Charles J. Hines for \$1,063.83; that the said Hines was the owner in fee simple of certain property in Chicago, Cook County, Illinois (describing it); that the complainants had a writ of execution issued on the said judgment and that the same was returned "No part found." The bill further alleges that prior to the rendition of the judgment and after the indebtedness upon which it was based had accrued, the said Hines and his wife, Carrie J. Hines, made a pretended conveyance of the said real estate to the defendant Anna Journey and that on the same date the said Journey quit

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claimed the property back to Carrie J. Hines; that both of said deeds were recorded on October 31, 1927; that each of said conveyances was made without any consideration and to defraud the complainants and to prevent them from satisfying their judgment against Charles J. Hines; that the property was being held by Carrie J. Hines for the use and benefit of Charles J. Hines and to prevent the levy and sale of the same under the said execution; that Charles J. Hines has no personal property and no other real estate subject to levy and sale than the said real estate so conveyed and that the said judgment of the complainants remains totally unsatisfied. The bill prays that the conveyance from Charles J. Hines and Carrie J. Hines, his wife, to Anna Journey, and the conveyance from Anna Journey to Carrie J. Hines, be set aside, so that the complainants may proceed to satisfy their judgment against the said real estate. The answer of the defendant Carrie J. Hines admitted that she and Charles J. Hines made and executed the deed to Anna Journey, but denied that it was for a pretended consideration and not for a good and valid consideration; admitted that Anna Journey quit claimed the property to her, but denied that said conveyance was for a pretended consideration and not for a good and valid consideration; averred that the said two conveyances were supported by good and valid considerations; denied that no consideration was paid by Anna Journey to Charles J. Hines; denied that no consideration was paid by her for the conveyance from Anna Journey to her, and denied that the premises are now held by her in trust for Charles J. Hines and for his use and benefit and for the purpose of preventing the levy on the same as alleged in complainants' bill.

The following is all the material evidence heard by the chancellor. The complainants, after introducing certified copies of

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the judgment in question and the execution and return thereon, called as a witness the defendant Charles J. Hines, who testified as follows: "I was a former customer of the complainants' and purchased meat from them when I was the owner of a meat market. I owed them the amount that they sued for in the Municipal Court and obtained judgment for. At the time I owed this money, my wife and I were the owners of the building located at 1155 East 54th Place, Chicago, Illinois. My wife and I conveyed this property to Mrs. Anna Journey and Mrs. Journey deeded the property back to my wife. My wife or I did not receive any money from Mrs. Journey nor did Mrs. Journey receive any money from my wife when she conveyed the property back to my wife. At the time my wife and I conveyed this property to Mrs. Journey, I was broke. The only property I had was my interest in this property. I conveyed my interest to my wife so that she could sell the property and give me my half of the proceeds so that I could pay up my bills. I have not as yet paid the judgment rendered against me in favor of L. Beck & Sons. * * * I did not convey the property to defraud any of my creditors. The property was conveyed so that it could be sold and I would get my share of the proceeds to pay my bills." The complainants, after introducing the warranty deed from "Charles J. Hines and Carrie J. Hines, his wife," to Anna Journey, conveying the premises in question, dated October 28, 1927, and also the quit claim deed of the same date from "Anna Journey, a widow," to Carrie J. Hines, rested. The defendant called Eba Mahoney, a real estate agent, who testified that she prepared both of the deeds in question and that Anna Journey was an employee in her office; that the latter "did not pay any money to Mr. and Mrs. Hines when the property was conveyed to her, neither did she receive any money from Mrs. Hines when she conveyed the property back to Mrs.

[illegible]

Hines alone." The defendant then called as a witness Norman Hines, who testified as follows: "My name is Norman Hines and I live with my mother at 1155 East 54th Place. I am the son of Charles J. Hines and Carrie J. Hines. My father was over to our home and I heard a conversation at that time, between my father and mother. My father told my mother to sell the building and give him half of the proceeds so that he could pay his bills." The defendant testified as follows: "My name is Carrie J. Hines and I live at 1155 East 54th Place. I am living alone now, having been divorced from Mr. Hines. Mr. Hines conveyed the property to me because my father had paid interest on the first mortgage and other bills pertaining to the building. The building was not conveyed to me in order to defraud any of Mr. Hines' creditors. I have kept up the building myself, without receiving any help from Mr. Hines. I did not know if Mr. Hines owed any people any money and if he did owe them money, I did not know who they were. We did not receive any money from Mrs. Journey when we conveyed the property to her, neither did I pay Mrs. Journey any money when she conveyed it back to me. I have no other property, other than the building I live in at 1155 East 54th Place." No other evidence than that we have recited was given in the case.

The complainants contend that under the facts and the law the chancellor erred in dismissing the bill for want of equity and that the decree of the Circuit Court of Cook County should be reversed with directions to the chancellor to enter a decree in accordance with the prayer of the bill of complaint. This contention is a meritorious one.

The complainants were obliged to make out a prima facie case, and that they did so is clear from the proof.

"If a person largely indebted makes a voluntary conveyance

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and shortly after becomes insolvent such conveyance will be held fraudulent. (Hauk v. Van Ingen, 196 Ill. 20.) There may be expressions in certain decisions which lend countenance to the idea that a voluntary conveyance will not be invalid for fraud if made when there is property remaining, the value of which at the time amounted to all the indebtedness, but the settled rule now is that if a person is largely indebted and makes a voluntary conveyance and shortly after becomes insolvent it is proper to set aside the conveyance as fraudulent." (Kennard v. Curran, 259 Ill. 122, 128; Fawyer v. Flesher, 208 Ill. App. 21, 26.) A voluntary conveyance from husband to wife for the purpose of placing the title in her name is void as against a judgment creditor of the husband whose debt existed when the conveyance was made. (Hauk v. Van Ingen, supra, 196 Ill. 20.) The mere fact that the defendant Charles J. Hines testified that he did not intend to defraud creditors, when he made the conveyance to Anna Journey, does not bind the court to believe him. "Intent to defraud creditors by the conveyance of property may be ascertained by inference, from the circumstances surrounding the transactions." (Kennard v. Curran, supra, 129.) The defendant Charles J. Hines testified that he conveyed his interest to his wife "so that she could sell the property and give me my half of the proceeds so that I could pay up my bills." At the time of the hearing the Hineses were divorced and their son Norman was living with his mother, the defendant Carrie J. Hines. He was called as a witness by the latter and he testified that he heard the conversation between his father and his mother and that the arrangement between them as to the property was testified to by his father. The defendant Carrie J. Hines did not deny this conversation. She stated that her former husband conveyed the property to her because her father

had paid interest on the first mortgage and other bills pertaining to the building, but she does not testify that her former husband made any statement that such was his purpose, nor does she give any facts upon which she bases her statement, and her testimony, at most, amounts to no more than her opinion as to the purpose of her former husband in making the conveyance. From the evidence adduced we must conclude that Charles J. Hines and Norman Hines testified truthfully as to the purpose of the conveyance. Charles J. Hines owed the debt to the complainants at the time of the conveyance; he was then "broke" and had no property of any kind save his interest in the premises in question, and his conveyance of the property under such an understanding with the defendant Carrie J. Hines was fraudulent as against the complainants. Where an insolvent person transfers his property to another, reserving to himself a beneficial interest therein, such a transaction is conclusively presumed, as an inference of law, to be fraudulent, without regard to the real motives or purposes of the parties. (Lawson v. Funk, 108 Ill. 502, 507.) "A debtor can not convey real estate to another, to be held wholly or in part in secret trust for himself." And in Lukin v. Aird, 6 Wall. 78, the United States Supreme Court recognizes the same doctrine in the following language: 'A trust thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right, * * * and gives to the debtor a beneficial enjoyment of what rightfully belongs to his creditors.'" (Lawson v. Funk, supra, 513.) Of course, the statement of Charles J. Hines that the understanding was that when he got his share of the proceeds of the sale of the property he would use it in paying his bills would not change the fraudulent character of the transaction, again any

event, even if he had an honest intent to pay his bills out of the proceeds, his purpose, if carried out, would "hinder and delay" his creditors.

Hines, although insolvent, had the legal right to prefer his wife if she was in fact a bona fide creditor; but the grantee being his wife, proof of the good faith of the transaction should be full and clear. (Vieter v. Swisky, 200 Ill. 257, 260.) Transactions of this character between husband and wife, where the former is insolvent, are to be carefully scrutinized. (McKey v. Emanuel, 263 Ill. 276; McKey v. McCoid, 298 Ill. 566, 571.) "It is the established rule of law in this State that a debtor may prefer a creditor or creditors and that such preference is valid notwithstanding the claims of other creditors, provided the debt preferred is actual and the property transferred does not greatly exceed the amount of the claim and that the transaction is not a mere device to secure an advantage to the debtor or to hinder, delay or defraud other creditors. This rule applies to members of a family, but where an immediate member of a family is preferred as a creditor there must be clear and satisfactory proof of a valid and subsisting debt which would be enforced and payment exacted regardless of the fortune or misfortune of the debtor. (Schuberth v. Schillo, 177 Ill. 346; Billman v. Madelhoffer, 162 id. 625.)" (Bartel v. Zimmerman, 293 Ill. 154, 162.)

It is apparent from the record that the defendant Carrie J. Hines must have based her defense to the bill upon her statement that "Mr. Hines conveyed the property to me because my father had paid interest on the first mortgage and other bills pertaining to the building." When and for whom the father paid the interest and other bills does not appear, nor does the record show what were the amounts

paid by him. Nor can we ascertain from the evidence whether the payments were made by way of loans or as gifts. If the father had a claim against Hines growing out of the alleged payments, did he cancel the same when Hines conveyed the property to his wife? Moreover, the conveyances were not made to the father, who, if anybody, had the claims against Charles J. Hines. We are entirely unable to find "clear and satisfactory proof" that the defendant had "a valid and subsisting debt which would be enforced and payment exacted regardless of the fortune or misfortune" of Charles J. Hines.

After a careful consideration of the evidence in this case, we are of the opinion that the conveyances in question were fraudulent as against the complainants, as charged in their bill, and the judgment of the Circuit Court of Cook County is reversed and the cause is remanded with directions to enter a decree in favor of the complainants as prayed in the bill.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, J., and Barnes, J., concur.

33286

CLARA F. BASS,
Appellant,

v.

CHARLES A. ALLEN, Jr.,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCALLAN DELIVERED THE OPINION OF THE COURT.

In the Circuit Court of Cook County, Clara F. Bass, plaintiff, sued Charles A. Allen, Jr., defendant, in an action of trespass on the case upon promises. There was a trial before the court with a jury and a verdict returned finding the issues for the defendant. Judgment was entered on the verdict and this appeal followed.

The plaintiff and defendant, on February 21, 1919, entered into a written lease whereby the plaintiff leased to the defendant the premises known as "the sixth floor, as now partitioned, of the building numbered 19-21 and 23 East Jackson Blvd., except the space now leased and occupied by Lembrandt studio," for a period commencing March 1, 1919, and ending April 30, 1927, at a rental of \$200 per month. The defendant entered into possession of the premises on March 1, 1919, and continued in possession until a fire occurred in the premises late on the night of May 20, 1926, or early in the morning of May 21, 1926. The lease contained (inter alia) the following provision: "In case said premises shall be rendered untenable by fire or other casualty, the lessor may, at his option, terminate this lease, or repair said premises within thirty days, and failing so to do, or upon the destruction of said premises by fire, the term hereby created shall cease and deter-

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mine." The fire did considerable damage to the premises. The plaintiff commenced repairing them about May 21, 1926, and the repairing work ended on June 19, 1926. She sued to recover rent for the eleven months commencing June 1, 1926, and ending April 30, 1927. In the lower court the defendant contended, first, that the premises were destroyed by the fire and that therefore the term of the lease ceased and determined; and second, that if the premises were not destroyed by the fire they were not repaired within thirty days, in that the skylights put in after the fire were smaller and gave less light than the original skylights that were in the premises before the fire and that consequently the premises were not repaired within the meaning of the provision in question in the lease and that therefore the term of the lease ceased and determined. It is evident from the brief of the defendant in this court that he does not here rely upon the first contention, and it is clear from the evidence that while the premises were badly damaged by the fire they were not destroyed. As to the second contention, the plaintiff claimed that the premises were repaired within thirty days.

The plaintiff contends that the court erred in giving to the jury, at the instance of the defendant, the following instruction:

"You are instructed that if the premises were so destroyed that they were rendered untenable for the purpose for which leased, you should find the issues for the defendant."

Both parties on the trial conceded that the fire rendered the premises untenable, but the theory of fact of the plaintiff was that she had repaired the premises within thirty days and she contends that the court, by this instruction, directed the jury to find for the defendant if they believed that the premises were so damaged that they were rendered untenable for the purposes

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for which they were leased and that the jury were compelled to find for the defendant under this instruction. We think the contention of the plaintiff is a meritorious one.

The plaintiff next contends that the court erred in giving, at the instance of the defendant, the following instruction:

"Even though you believe that the premises leased to Mr. Allen were not destroyed, yet unless you believe that they were repaired within a reasonable time so that in reference to the business for which they were leased the premises were in substantially the same condition in which they were when Mr. Allen took possession of the premises, you must find the issues for the defendant."

The lease provides that the lessor may repair the premises within thirty days, and there is no provision in it requiring her to repair them within a reasonable time. The plaintiff contends that even if the jury found the repairs were made within thirty days, still, by this instruction, they were "permitted to substitute for the thirty-day period in the first clause of the lease for the making of repairs by the lessor such period as they in their judgment might consider a reasonable time," and to find for the defendant if they believed that the time taken for making the repairs - thirty days - was unreasonable. We think this contention is a meritorious one.

The defendant does not argue that these two instructions correctly state the law bearing on the case, but he contends that the giving of the instructions did not constitute prejudicial error because "the instructions of the Court taken as a whole presented the issue fairly," and he cites certain other instructions given, in support of his contention. In Bald v. Huernberger, 267 Ill. 616, 620, it is stated that "this court has frequently held that instructions may supplement each other, but each one must state the law correctly as far as it goes, and they should be in harmony, so that the jury will not be misled. The jury are not able to select

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from contradictory instructions one which correctly states the law. (Illinois Iron and Metal Co. v. Weber, 196 Ill. 526; Ratner v. Chicago City Railway Co., 233 id. 169; People v. Lee, 248 id. 64; People v. Norick, 265 id. 436.)"

The defendant next contends that the giving of the two instructions should not be held to be prejudicial error for the reason that his counsel in the closing argument stated to the jury that if the premises were rendered merely untenantable and not destroyed the defendant was not released from liability if the premises were properly repaired. The counsel has not cited any decision sustaining the argument he makes, that a party may cure erroneous instructions given to a jury at its instance, by statements made by its counsel in closing argument. As argued by counsel for the plaintiff in her brief, "the instructions given by the Court followed whatever statement counsel may have made to the jury, and coming from the Court must have had far greater weight with the jury, to say nothing of the fact that the instructions given by the Court were in writing and were taken by the jury to the jury room."

The defendant next contends that the verdict should not be disturbed because of the giving of the two instructions, because the jury could not under the evidence reasonably find any different verdict. It is conceded in the evidence that light was necessary to the defendant in the conduct of his business, and he argues that the jury, if it acted reasonably, could have made no other finding than that the skylights in the premises after the repairs were made were fewer and smaller than those in the premises before the fire and that therefore the plaintiff had not repaired the premises, and a new trial should be denied, notwithstanding the giving of the two instructions in question. We cannot agree with the defendant as

to the effect of the evidence in regard to the skylights. While it is true that the new skylights were not the same as the old ones in number and size, nevertheless, we think that the jury, without acting unreasonably, might have found from the evidence that the new skylights, in quality and method of construction, were superior to and gave more light to the premises than the old.

In our judgment, the trial court committed reversible error in the giving of the two instructions complained of, and the judgment of the Circuit Court of Cook County is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

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NEANIE W. ARMBRECHT,
Appellant,

v.

CLAYTON C. PICKETT and
EDWARD OLSEN,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit brought by Neanie W. Armbricht, the holder of a promissory note, against Clayton C. Pickett, Edward Olsen and William R. Lindley, three of the four makers thereof, the fourth maker, Louis Armbricht, having died prior to the filing of the second amended declaration. The note was made payable to L. Armbricht, who indorsed the same to the plaintiff. Service was not obtained upon the defendant Lindley. The case was tried before the court, with a jury, and at the conclusion of all the evidence the trial court directed a verdict for the defendants. Judgment was entered on the verdict and this appeal followed.

Each defendant pleaded failure of consideration and in his affidavit of merits alleged that the note in question was given to Louis Armbricht, the husband of the plaintiff, pursuant to an agreement made between the makers and the payee that the makers and the payee would organize a corporation to operate the New Lyda Theater, located in Chicago, Illinois, "and thereupon deliver to this affiant Twenty-five Per Cent of the Capital stock of said Corporation; that the organization of said corporation and delivery of the stock in same to this affiant was the consideration for the signing and delivery of said promissory note to

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the said L. Armbrecht; that the said corporation was never organized and this affiant never received any stock in said corporation; that the consideration of said note entirely failed on that account; that the plaintiff had knowledge of all the foregoing facts prior to her acquisition of said note in question; that the plaintiff herein was not an innocent purchaser for value and is not a bona fide holder of said note." The defendant Olsen also alleged that Louis Armbrecht had given him a release in writing from all obligations prior to the time of the indorsement of the note to the plaintiff.

The plaintiff made formal proof of the execution of the note by the makers, its delivery to the payee, the indorsement by the payee and delivery to the plaintiff. Thereupon the defendants introduced evidence tending to support the defense of failure of consideration. In rebuttal the plaintiff introduced the testimony of Ira E. Westbrook, an attorney at law who represented Louis Armbrecht at the time of the execution of the note. He testified, on direct, that Louis Armbrecht and the defendants Pickett and Olsen had a number of conversations in his law office about the time of the making of the note; that the said defendants wished to borrow \$5,000 from Armbrecht and that the note upon which this suit was brought was given to evidence the indebtedness of the defendants to Louis Armbrecht arising out of \$5,000 advanced by Armbrecht to the defendants. The plaintiff testified, on direct, without objection, that she had a conversation with the defendants in the office of Westbrook the morning of the day the note was signed; that Westbrook was present at the conversation, but that her husband, Louis Armbrecht, was not; that Olsen stated that the defendants wished to borrow \$5,000 from Louis Armbrecht for ninety days and that they would return it at the end of that time, with six per

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cent interest. The plaintiff further testified that she was the owner of a \$6,000 mortgage and that she allowed Louis Ambrecht to borrow, on said mortgage, the \$5,000 which he loaned to the defendants; that the Austin State Bank issued a cashier's check for \$5,000 (having as security for the same the said mortgage) and that she saw Louis Ambrecht hand the said check to Olsen, in the presence of Pickett.

The plaintiff contends that taking the testimony of Westbrook alone, there was clearly sufficient to go to the jury on the issue of the consideration for the note. It is the established rule that on a motion to direct a verdict only that evidence can be considered which is in favor of the party against whom the motion is directed, and that evidence must be considered most favorably to that party, together with all legitimate inferences which might be drawn from it in his favor." This contention is a meritorious one. The trial court, in passing upon the motion to instruct the jury to find a verdict for the defendants, apparently ignored the evidence given by Westbrook on the direct examination, upon the assumption that the cross-examination of the witness so weakened the testimony given on the direct as to make it practically valueless. "On the motion to direct a verdict only that evidence can be considered which is in favor of the party against whom the motion is directed, and that evidence must be considered in the light most favorable to that party, together with all legitimate inferences which may be drawn from it in his favor." (Shannon v. Nightingale, 321 Ill. 168, 176.)

The trial court did not strike from the record the testimony of the plaintiff, above set forth, but in passing upon the motion to direct a verdict he indicated that he did not regard the plaintiff as a competent witness to testify as to the said conversa-

tion or as to the circumstances connected with the payment of the \$5,000 to the defendants. In sustaining the motion to direct a verdict the trial court necessarily acted upon the assumption that the testimony of the plaintiff, save as to the execution, delivery and indorsement of the note, had to be disregarded. The trial court erred in this regard. The husband of the plaintiff was dead; the litigation concerned her separate property. She was clearly competent to testify as to the conversation she had with the defendants outside of the presence of her husband, and she was also competent to testify as to the circumstances relating to the payment of the \$5,000 to the defendants. See Mahlstedt v. Ideal Lighting Co., 271 Ill. 154, where the supreme Court reviews at length the history and intent of section 5 of the statute on evidence.

The plaintiff further contends that while the record shows that the court regarded the plaintiff as incompetent to testify to the evidence in question, nevertheless, the evidence was not stricken from the record, and that therefore, even though it was incompetent, the trial court, in the state of the record, was obliged to consider it in passing upon the motion to direct. This contention is also a meritorious one. (See Bechtel v. Marshall, 283 Ill. 486, 490.)

The major contention of the defendants is that the trial court saw the witnesses and heard the evidence, and was best able to judge which witnesses were telling the truth, and that therefore his action in directing a verdict in the present case should be sustained. This contention requires no answer.

The judgment of the superior Court of Cook County is reversed and the cause is remanded.

FOR REMAND.

Gridley, P. J., and Barnes, J., concur.

33304

SOUTHGATE BROKERAGE CO., a
corporation, trading as
Southgate Produce Co.,
Appellant,

v.

CARL and W. J. PIOWATY, a
corporation,
Appellee.

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APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Southgate Brokerage Company, a corporation, trading as Southgate Produce Company, plaintiff, sued Carl and W. J. Piowaty, a corporation, defendant, in the Municipal Court of Chicago in a contract action. The case was tried by the court, without a jury, and after evidence heard the court found the issues in favor of the defendant. Judgment was entered on the finding and this appeal followed.

Plaintiff's statement of claim alleges a written contract with the defendant for the sale by the plaintiff to the defendant of four cars of potatoes, each containing 200 barrels, at \$4.90 per barrel; the shipment and delivery of the merchandise in accordance with the agreement; the refusal of the defendant to accept the same; the sale of the goods elsewhere; and that the difference between the contract price and the price realized on the resale was \$823.93, which sum the defendant has refused to pay. A copy of the written contract was attached to and made a part of the statement of claim. The affidavit of merits filed by the defendant denies (inter alia) shipment and delivery of the merchandise according to the terms of the contract attached to the

statement of claim and "denies that defendant refused to accept the four cars of potatoes in violation of said contract." On June 20, 1927, the parties entered into the following written contract:

"Standard Confirmation of Sale.

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| Date ordered June 20, 1927 | (In Person |
| " confirmed June 20, 1927 Check | (Telephone Yes |
| Now sold. | (Telegraph..... |
| | (Letter..... |

The broker or salesman on receiving notice of the seller's acceptance of the buyer's order shall fill out this Standard Confirmation of Sale in triplicate and present all three copies to the buyer for authentication by his signature. The broker or salesman shall also sign the three copies on behalf of the seller and shall deliver one copy to the buyer and one to the seller and shall retain the third for his file. This Standard Confirmation of Sale as authenticated by the buyer and broker or salesman shall constitute the complete contract of sale and neither party shall have the right to rely on oral representations or promises of the other. All modifications must be in writing and authenticated in the manner provided above for this Standard Confirmation of Sale to which such modifications shall refer. Unless the seller makes immediate objection upon receipt of his copy of this Standard Confirmation of Sale, showing sale was made contrary to authority given the Broker or Salesman, he shall be conclusively presumed to agree that the terms of sale as set forth herein are fully and correctly stated.

City Chicago, Ill. Date June 20, 1927.
Sold to Carl & W. J. Flowny - Chicago, Ill.
Ship to Carl & A. J. Flowny - Chicago, Ill.
Advise
Railroad Delivery Preferred.....Positive Routing....
Sold for account of Southgate Produce Co., Norfolk, Va.
Shipment from Elisabeth City, N. C. section
Time of Shipment June 18, 1927
Rolling Car Yes, diverted from Norfolk, Va. June 20th, 1927.
Car No. and Initial.....
How shipped or to be shipped.....
Style of Equipment - Refrigerator Car Box Car
Ventilated Car..... took Car.....
Sale made (F. O. B. or Delivered) W. O. B. loading point
Terms, how payable.....
Special Agreement, if any.....
(It is understood, unless otherwise stated herein, this sale is made in contemplation of and subject to the standard rules and Definitions of Trade Terms printed on the back hereof)
Quantity, 4 cars. Commodity and Specifications, Potatoes - U. S. ones - Branded - Stave Barrels. Price \$4.90.
Signed Carl & W. J. Flowny
Buyer.
Southgate Produce Co.
Seller.

By H. A. Hock
Broker or Salesman.

I hereby certify that I am authorized by the seller named above, as his Broker or Salesman, to fill out this standard Confirmation of Sale and sign and authenticate the same in his behalf.

(Signed) H. A. Hock

Seller's Copy"

On the back of the contract appear certain "Standard Rules and Definitions of Trade Terms for the Fruit and Vegetable Industry," but they have no material bearing on the case. Early in the morning of June 14, 1927, four cars of potatoes shipped by the plaintiff arrived in Chicago. Each car was consigned to the plaintiff company "advise Carl & J. Piowaty." The plaintiff, on June 21, 1927, in Norfolk, Virginia, drew - through a Chicago bank - four drafts on "Carl & J. Piowaty, Chicago, Ill.," each for \$980. Attached to each draft was an order reading as follows:

"Southgate Produce Co.
General Offices - Southgate Terminal
Norfolk, Va.

Freight Agent,
Ill. Central
Chicago, Ill.

Dear Sirs:

Upon surrender of this order and payment of freight charges, please deliver the within described merchandise as noted below:

Deliver to the order of Carl & J. Piowaty, Chicago Ill
Car Initial and Number SAL 80082
Containing 200 barrels Irish Potatoes
Point of Origin Belcross N.C.
Late shipped 6/19/27
Consigned to our company, advise Carl & J. Piowaty
Very truly yours,
Southgate Produce Company,
By L. H. Bunting."

The evidence does not show when, if at all, the Chicago bank to whom the drafts were sent presented them to the defendant. To prove that the drafts were presented to the defendant, the plaintiff called as a witness John H. Secrestate, assistant cashier of the bank to whom the drafts were sent. Mr. Secrestate was not in the employ of the bank at the time of the transaction in question and he stated that he had been sent to court by the bank merely to identify the drafts. On the

back of each draft appears the following, written in lead pencil: "6/23/27 6/24/27." Mr. Secreste stated that he did not know in whose handwriting these figures were and he had no personal knowledge as to whether or not the drafts had been presented to the defendant; that the method of the bank is to mark the reverse side of a draft, as the drafts in question were marked, when it had been presented for payment; that he did not know in whose possession the drafts had been and that he saw them that day for the first time. The defendant strenuously objected to the introduction of the drafts on the ground that the plaintiff had not shown by competent evidence that the drafts had ever been presented to the defendant. The court admitted the drafts, as records of the bank, but at the same time stated that the evidence did not prove when, if at all, they were presented to the defendant. The plaintiff also failed in an attempt to prove by Carl Piowaty that the drafts were presented to the defendant on July 23 and 24. It was expected that the cars would arrive in Chicago on July 23, but they did not arrive there until the morning of the 24th, and the defendant was then unable to get possession of the potatoes because of the fact that they were consigned to the plaintiff. The defendant then refused to accept the potatoes on the ground that they had not been shipped in accordance with the contract, and it called attention to the fact that June 25 fell on Saturday and there was no trading that day on the potato market in Chicago, and it stated that it would not accept the potatoes under the circumstances. It appears that the price of potatoes on the market was declining. The defendant claimed that the plaintiff had sold it some potatoes a week prior to the time in question, under a contract similar to the one in the present case, and that when the potatoes reached Chicago the defendant was unable to get

possession of the same for two or three days because the plaintiff had shipped them to itself and that the defendant had been put to trouble and expense in connection with this transaction, and that at the time of the making of the instant contract it notified the agent of the plaintiff that it would transact no more business with the plaintiff unless the latter lived up to the terms of its contract.

It is perfectly clear that the plaintiff did not make the shipment in accordance with the terms of the written contract, but the plaintiff contends that custom gave it the option to ship the potatoes the way it did. There is no merit in this contention. Custom cannot be set up to vary the terms of the written contract in this case. Evidence of custom or usage is sometimes admissible to add^{to} or to explain the terms of a contract, but it is never admitted to vary or to contradict the terms of a written instrument. (Gilbert & Co. v. McGinnis et al., 114 Ill. 28, 33; L. E. & M. F. Ry. Co. v. Richards, 126 Ill. 448, 456.) This rule is too well established to require further citations.

The plaintiff next contends that the proof shows that the defendant, as well as the plaintiff, interpreted the contract to mean that the plaintiff had the right to ship the potatoes to the defendant directly or to ship them in the manner that it did, and that therefore the court, in construing the contract, must look to the interpretation of the parties in passing upon the question as to whether the plaintiff has performed in accordance with the contract. We do not agree with the plaintiff as to the effect of the evidence as it is perfectly clear from the proof that the defendant refused to accept the potatoes on the ground that they were not shipped in accordance with the contract. "In giving an interpretation to a written contract it is always proper, when the writing is not specific, to ascertain the circumstances surrounding the parties and the object

they had in view to ascertain the true meaning, and effect will be given to the intention wherever it can be done without doing violence to the plain and obvious meaning of the language employed. McBride v. Rowe, 2 Gilm. 91; Gray v. City of Chicago, 4 Ill. 501; Robinson v. Law, 38 id. 308; Thomas v. Higgins, 41 id. 470; Hayes v. O'Brien, 149 id. 403; Mathews v. Perfect, 167 id. 313; Parroll v. Brury, 170 id. 371; Bradenbur. v. Beer, 271 id. 622; 2 Parsons on Contracts, 494; Bishop on Contracts, etc. 38; 6 N. E. 436; 13 Corpus Juris, 842." (*Self v. Cahill et al.*, 339 Ill. 190, 192.) (Italics ours.) If the language of a written contract is ambiguous or indefinite, proof of the practical interpretation placed upon the contract by the parties themselves is admissible. (Armstrong Paint Works v. Lac Co., 351 Ill. 102. In our judgment, the language of the contract as to the manner in which the shipment should be made is perfectly clear, and it would be doing violence to the plain meaning of the language employed to permit the contract to be interpreted as contended for by the plaintiff.

The plaintiff next contends that the defendant attempted to establish by parol evidence a contract different from that expressed in the written document. As we read the record, it was the plaintiff, not the defendant, that attempted to vary the terms of the written contract.

The plaintiff strenuously argues that the defendant would not have refused to accept the potatoes if it had not been for the fact that the market prior of the same was declining. Even if this contention were true, it could not control our decision on the question before us.

The judgment of the Municipal Court of Chicago is affirmed.
 AFFIRMED.
 Gridley, J. J., and Barnes, J., concur.

33338

OSCAR RUBIN,
Appellee.

v.

LOUIS KAPLAN and
JACOB KAPLAN,
Appellants.

258 A. 622²
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, in an action of the first class, Oscar Rubin, plaintiff, sued Louis Kaplan and Jacob Kaplan, defendants. The case was tried before the court with a jury and there was a verdict returned finding the issues against the defendants and assessing the plaintiff's damages at \$1,200. Judgment was entered on the verdict and this appeal followed.

The claim of the plaintiff was based upon a written contract between him and the defendants. Plaintiff was the owner of certain premises and leased the same to ^{one} Jacob Greenman for a period of five years. By the terms of the lease the plaintiff was obliged to make certain alterations and repairs upon the premises and the written contract provides that "as a condition precedent on the part of the said first party for the execution of said lease and the expenditure of the necessary cost for the alterations mentioned in the rider of the lease above referred to, the said first party has required a guarantee for the expenditure of said moneys," and the defendants guarantee the repayment to the plaintiff of all moneys expended by him in making the alterations and repairs upon the premises, provided, however, that should the said Greenman remain in the premises for the full period of the lease then the guaranty

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should be null and void, but that in the event said Greenman should fail to abide by the conditions and terms of the lease as to the payment of rent or otherwise, then the defendants agree to compensate the plaintiff for any and all moneys necessarily expended by him on account of the repairs and alterations. The amended statement of claim further alleged that in reliance upon the contract the plaintiff made alterations and repairs on the premises amounting to \$2,090; that on May 1, 1925, Greenman failed to pay the rent for the said premises and vacated the same and that the defendants have refused to pay to the plaintiff the said \$2,090 or any part of the same. In the amended affidavit of merits of the defendants, the defendants aver (inter alia) "that said Jacob Greenman was constructively evicted from said premises, but paid rent for the period of time that he occupied the said premises."

The defendants contend (inter alia) that "the court erred in excluding from the consideration of the jury defendant's proffered testimony that Greenman had been constructively evicted from said premises." This contention is a meritorious one. The defendants attempted to make proof in reference to the alleged constructive eviction and the plaintiff objected, whereupon the court asked the counsel for the defendants what the defendants expected to show, and thereupon the counsel made the following offer:

"We propose to show by this witness and the witness, Jacob Greenman, that prior to the execution of the lease in question, plaintiff promised Greenman that he would put the premises in such shape so that water and leaks from the pipes in the walls and ceilings surrounding this cheerroom would be repaired, and that upon such representation the lease was signed. After the lease was signed and while the other repair work was being done by the landlord in accordance with the provisions of the lease, it appearing that water still was continuing to leak into the store in question, attention was again called by Greenman to plaintiff

to that situation and with the conditions existing on April 1st, Greenman said to Rubin that he would not move in unless that condition is fixed, and Rubin thereupon said that if Greenman would move in he would fix the plumbing and water pipes so no more water would come into the store. Upon such representation, Greenman did move in about April 2, 1925, and after that Rubin did unsuccessfully endeavor to repair the water pipes and the leaks in the ceilings, but the water continued to fall from the ceiling and walls, including human offal and dirt; that such matter fell on the automobiles stored in the premises; that inverted light globes became filled with this material and water and frequently said globes fell upon brand new automobiles and marred and damaged the same, and that condition continued for eight months thereafter; that Rubin repeatedly promised to repair that condition, but did not stop it and that thereafter Greenman moved out in May, 1925, having paid all the rent due under the lease up to that time; that this stuff that came down on the automobiles damaged at least 25 new cars, said loss running to at least \$10,000. That before Greenman moved out he tendered the keys back to Rubin and told him he was moving out on account of the conditions stated and did move out;"

"which offer of proof on behalf of said defendants was denied by the court." In our judgment, the evidence offered made out a prima facie case of constructive eviction (Gibbons v. Hoefeld, 299 Ill. 455), and the court erred in his ruling. The plaintiff contends that the question of constructive eviction had been decided, and adversely to Greenman, in two cases, wherein the plaintiff sued Greenman for rent under the lease in question, and that therefore the doctrine of former adjudication applied. It will be noted that the defendants were not parties to the suits for rent. However, it is a sufficient answer to the instant contention to say that although the defendants set up the defense of constructive eviction in the affidavit of merits the plaintiff did not see fit to file a plea of former adjudication, nor did he, at the time the defendants made the offer of proof, in any way raise, or even suggest, the question of former adjudication. Counsel for the plaintiff attacks the good faith of counsel for the defendants in raising the present contention and contends that the plaintiff did raise the question of former adjudication when the evidence was offered and that the trial court barred the said evidence

upon the theory that the question was res adjudicata. The record absolutely fails to sustain the plaintiff in this contention.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVISED AND RECORDED.

Gridley, P. J., and Barnes, J., concur.

33368

WILLIAM F. CONNERY,
Appellee,

v.

J. F. McCONNACK COMPANY,
INC.,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE MCANLAN DELIVERED THE OPINION OF THE COURT.

William F. Connery, plaintiff, sued J. F. McCormack Company, Inc., defendant, in the Municipal Court of Chicago in an action of the first class. There was a trial before the court without a jury and after evidence heard the court found the issues against the defendant and assessed the plaintiff's damages at the sum of \$1,250. Judgment was entered on the finding and this appeal followed.

The plaintiff filed a statement of claim alleging "that he is and was in the year A. D. 1927, a duly licensed Real Estate Broker in the City of Chicago, County of Cook and State of Illinois, and that he entered into an agreement with the defendant whereby he was employed by the defendant to sell the hereinafter described real estate and receive as compensation therefor, a commission equal to ten (10) per cent of the sale price of the real estate so sold. Plaintiff alleges that he was the procuring cause and negotiated the sale for defendant, of" certain real estate (describing it) "to one Frank Powers for the sum of Twelve Thousand Five Hundred (\$12,500.00) Dollars," and plaintiff alleges that there is due him for commission \$1,250 with interest at the rate of five per cent from September 9, 1927. The defendant filed an affidavit of merits

as follows: "F. Goldman, being first duly sworn, deposes and says that she is the duly authorized agent of the defendant in the above entitled cause; that she has knowledge of the facts and that she verily believes that said defendant has a good and meritorious defense to the whole of the plaintiff's claim. Affiant denies that said plaintiff and said defendant entered into an agreement as set forth in plaintiff's Statement of Claim. Affiant further denies that said plaintiff was the procuring cause and negotiated the sale for said defendant, of certain lots as set forth in plaintiff's Statement of Claim or otherwise. Affiant is not informed as to whether said plaintiff is now or was in the year . . . 1927, a duly licensed real estate broker in the City of Chicago, as alleged by said plaintiff. Affiant denies that said defendant is indebted to said plaintiff in the sum of Twelve Hundred Fifty Dollars (\$1250.00) with interest as set forth in plaintiff's Statement of Claim, or in any other sum whatsoever. (Signed) F. Goldman. Subscribed and sworn to before me this 31st day of August, . . . 1928. (Signed) "M. L. Lane (Seal)" At the outset of the trial the trial court expressed the opinion that the affidavit of merits amounted to merely a general denial but that as there was no motion on the part of the plaintiff to strike the same he would proceed to hear evidence and if later the plaintiff wished to make a motion to strike the affidavit of merits from the files, and if the court should grant said motion, he would give the defendant the right to amend its affidavit of merits. Still later in the hearing the court stated that he would allow the defendant to amend its affidavit of merits at any time before judgment. Thereafter, during the hearing, counsel for the defendant presented to the court an amended affidavit of merits and asked for leave to file the same. The following is

the said affidavit: "V. Goldman, being first duly sworn, deposes and says that she is the duly authorized agent of the defendant in the above entitled cause; that she has knowledge of the facts and that she verily believes that said defendant has a good and meritorious defense to the whole of the plaintiff's claim. Affiant denies that said plaintiff and said defendant entered into an agreement as set forth in plaintiff's statement of claim. Affiant further denies that said plaintiff was the procuring cause and negotiated the sale for said defendant, of certain lots as set forth in plaintiff's statement of claim, or otherwise. Affiant further states that one, John Bigler, was the procuring cause and negotiated the sale for said defendant, of the property described in plaintiff's Statement of Claim. Affiant further states that said plaintiff, in attempting to negotiate the aforementioned sale, represented both the plaintiff and defendant herein, without disclosing to either said plaintiff or said defendant, the fact of his double representation or of his conflicting interests in said sale. Affiant further states that said plaintiff was himself one of the parties for whom said plaintiff was attempting to accomplish said sale; that said plaintiff never disclosed to said defendant, his interest as a purchaser of the property for which he was attempting to negotiate a sale in behalf of said defendant. Affiant further states that prior to the consummation of the aforementioned sale by said John Bigler, and prior to the confirmation and acceptance of said sale by said defendant, said plaintiff admitted to said defendant, that said defendant owed said plaintiff no commission for the making of said sale or otherwise, and said plaintiff thereupon waived all claim for commission or other compensation from said defendant; and said defendant, in reliance upon said representations by said plaintiff, accepted and confirmed said sale negotiated by said John Bigler, and thereafter

acted in accordance with and in reliance upon said representations. Therefore affiant denies that said defendant is indebted to said plaintiff in the sum of Twelve Hundred Fifty Dollars (\$1250.00) with interest as set forth in plaintiff's Statement of Claim, or in any other sum whatsoever. (Signed) F. Goldman. Subscribed and sworn to before me this 30th day of October, A. . . 1928. (Signed) Marie C. Guhr, Notary Public. (Seal)" The court, on objection by the plaintiff, denied the defendant leave to file the same at that time, but stated that if at the end of all the evidence the defendant still wished to file the amended affidavit of merits he would grant it leave to do so. Later, during the hearing of the evidence, the defendant renewed its motion for leave to file the said affidavit and the court then granted it leave to file the same and an order was entered to that effect. The plaintiff then made a motion to strike the said affidavit from the files and this motion was granted. The plaintiff thereafter proceeded upon the theory that the defendant was then in default and the trial court, in his rulings, at times, apparently adopted the same theory, but at other times he seemed to accord to the defendant the right to make a defense to the action.

The defendant contends that the amended affidavit of merits set up a defense to the action and that the court erred in striking the same from the files. In our judgment, this contention is a meritorious one.

The defendant contends that the court excluded proper evidence offered by the defendant and it further contends that the court admitted, over the objection of the defendant, incompetent evidence offered by the plaintiff. These contentions are meritorious.

The defendant further contends that it "was deprived of

a fair trial by reason of the prejudice of the court and the court's conduct during the trial." After a careful examination of the record in this case, we regret to state that this contention is plainly a meritorious one. The attitude and manner of the judge during the trial showed hostility to the defendant. He constantly suggested to counsel for the plaintiff that he make objection to questions put to witnesses by counsel for the defendant. He at times conducted the cross-examination of witnesses called by the defendant. Throughout the proceedings he showed bias and prejudice.

The defendant has not had a fair and impartial trial and it would be a grave injustice to permit the judgment in this case to stand. The judgment of the Municipal Court of Chicago is reversed and the cause is remanded with directions to the court to vacate the order striking the amended affidavit of merits from the files.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, J., and Barnes, J., concur.

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33324

FLORENCE C. FERGUSON,
(Plaintiff) Appellee,

vs.

JOSEPH STULGISSIKI and STANLEY
DOVIAT,
Defendants.

On Appeal of STANLEY DOVIAT,
Appellant.

25-4-22⁴
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendants to recover damages for personal injuries sustained in a collision between automobiles. Suit was first brought against Joseph Stulgieski, the owner of the automobile, who it is alleged caused the accident. Stanley Doviak was subsequently made an additional party defendant. Upon trial plaintiff had a verdict against both defendants for \$4,500, and from the judgment on the verdict Doviak appeals.

It is conceded that Stulgieski owned the offending automobile and that Doviak, a guest, was sitting beside him at the time of the accident. The decisive question is whether Doviak was driving at the time of the collision. Stulgieski claims that not he but Doviak was the driver, while Doviak denies that he was driving the car.

The only witness who testified directly that Doviak was driving was his co-defendant, Stulgieski. On the other hand, in addition to Doviak, there were a number of witnesses who testified that Doviak was not driving. Mr. Ebert witnessed the accident and his testimony was that he talked with Stulgieski, who admitted that he was the owner and had been driving the car. Mr. McCaffrey, who was standing nearby just before the accident, testified positively

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that Stulgiski was driving the car and not Doviak. Another witness saw Stulgiski driving the car. This witness knew Doviak and waved to him as they passed. Mrs. Koriwa was in the rear seat of the Stulgiski car with her child at the time of the accident and she also testified that Stulgiski was driving it. Mr. McMahon, who was driving another automobile, witnessed the accident and arrested Stulgiski and took him to the police station and swore out a complaint against him for reckless driving. Stulgiski was kept in the police station all night and was released on bond the following day. He was tried on two charges, one of reckless driving and the other assault with a deadly weapon. He was convicted on the latter charge and fined but released on the former. At these hearings he testified that he was driving his car at the time of the accident.

When he was served with summons in the instant case, Stulgiski pleaded but did not deny ownership or operation of the car at the time of the accident. His explanation of the change in his testimony is that after the trial in the Municipal court he asked Doviak for money to pay the fine but that Doviak refused to give him any. Stulgiski admitted that he was "sore" at Doviak because Doviak would not give him money. A witness, Zukas, testified that he heard Stulgiski say to Doviak that he, Doviak, had promised to "stick with me when we pay this bill and also if I take all the blame." Doviak denied that such a conversation took place.

Upon the entire record we are convinced that the conclusion of the jury that Doviak was driving the automobile at the time of the accident and that his negligent driving caused it was clearly contrary to the weight of the evidence.

Defendant offered to prove by a chauffeur for the Yellow Cab company that he taught Doviak to drive an automobile in October, 1927, which was some months after the accident, and that

at this time Deviat was not capable or able to drive a car. This testimony was rejected by the court and the jury instructed to disregard it. We think this evidence should have been admitted. The law is that, whenever there is a conflict in the evidence relative to the issue, evidence of collateral facts which have a direct tendency to show that the evidence of one side is more reasonable and therefore more credible than that of the opposite side is admissible. Standard Brewery v. Healy, 209 Ill. App. 272, and cases there cited.

Counsel for the defendant Deviat makes some point with reference to the giving of instructions, but his brief does not give us sufficient information as to these and the instructions complained of are not set out in the brief. We cannot tell from the meager reference to them whether or not it was error to give them. Instructions criticized should be set out in the brief. G. P. S. Co. v. L'Honniedieu & Sons, 228 Ill. App. 211.

For the reasons above indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Witchett and O'Connor, JJ., concur.

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33441

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ANNE RAYMOND,
Appellee,

vs.

CENTRAL METALLIC CASKET CO.,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MESURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks the reversal of a judgment against it of \$3738.88 entered in a suit on a promissory note where defendant's amended affidavit of merits was stricken and an order of default for want of an affidavit of merits was entered.

Plaintiff's statement of claim declared on a promissory note dated November 25, 1924, due on or before four years after date executed by the defendant, payable to the order of Joseph A. Raymond, for \$3015.23 and interest. The note bears the endorsement under date of December 17, 1924, as follows:

"Pay to the order of Anne Raymond
J. A. Raymond."

The stricken amended affidavit of merits asserted that the defendant had a good defense to the whole of plaintiff's claim; that (1) the note was not transferred to Anne Raymond at the time of the alleged endorsement nor at any other time prior to maturity; (2) the note was not endorsed by Joseph A. Raymond in blank or otherwise or transferred to the plaintiff at any time, and that Anne Raymond, the plaintiff, did not become the owner of the note at any time; (3) eleven days before the note became due, Joseph A. Raymond, the original payee, advised the defendant in writing that he owned the note and requested payment for himself; likewise the attorney for Joseph A. Raymond so advised defendant and demanded payment of the note; (4) that the defendant caused the alleged endorsement on

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the note to be examined by a handwriting expert and is advised and states the fact to be that the note was fraudulently endorsed to plaintiff by Joseph A. Raymond after the same became due and not on the date appearing in the endorsement; (5) the proceeds in the hands of the defendant due on the note have been attached by a creditor of Joseph A. Raymond while said note was still his property and that said attachment proceeding is still pending in the Municipal court, case number 1420575; (6) defendant denies that plaintiff owns the note by virtue of any endorsement and asserts that she is not the bona fide owner and holder of the same and did not acquire the same in due course for value before maturity; (7) that Joseph A. Raymond, the payee, was the owner of the note until after the same became due and until after the attachment suit was commenced against him, and that \$3,000 of the money due from the defendant on the note was attached and garnisheed and an attachment writ and garnishee summons were served on this defendant, which suit is still pending in the Municipal court; that a check for the balance of money in excess of the \$3,000 attached in said suit was sent to Joseph A. Raymond's attorney, as per request of Joseph A. Raymond; that said check was returned and the funds are still held by this defendant for the benefit of Joseph A. Raymond; (8) that Anne Raymond, the plaintiff in the instant suit, is the wife of Joseph A. Raymond, the payee in the note; that she did not become the owner of said note before maturity, is not a bona fide owner for valuable consideration, and her right to the proceeds of said note is subject to the rights of the attaching creditor who sued Joseph A. Raymond and who has attached \$3,000 of the money due on said note which are in the hands of this defendant. Said affidavit of merits further asserted that the transfer of the note to Anne Raymond after the maturity thereof and after the attachment suit was commenced and the defendant garnisheed was fraudulently made for the purpose of defeat-

ing the creditors of Joseph A. Raymond, and that the instant suit has been fraudulently started by Anne Raymond, who is in collusion with Joseph A. Raymond, her husband.

The court held this amended affidavit insufficient and in so doing we are of the opinion committed reversible error.

To the criticism that the affidavit of merits shows that the defense does not go to the whole of plaintiff's demand but only to \$3,000 of it, it is sufficient answer to say that, where a pleading consists of several parts, it is good if any portion or paragraph thereof sets up a legal defense or legal claim and that no advantage can be taken of the fact of duplicity without special complaint thereof, and is not reached by a general motion to strike. American Hard Rubber Co. v. Howe, 280 Ill. 431.

The affidavit in various ways asserts that there was no valid assignment of the note by Joseph A. Raymond to the plaintiff, Anne Raymond, and denied that she was the owner of the same. This set up a good defense insofar as it denied the validity of the assignment. Gray, Trustee, vs. Cohen, 182 Ill. App. 313.

Defendant attempts some argument predicated upon the probabilities of the result in the garnishment suit, but so long as the garnishment suit is pending, no finding could be entered in the instant case based on the probabilities as to the outcome of the other proceeding.

Defendant made a motion to consolidate the two cases for hearing and thus dispose of all the matters in controversy between the parties. It would have been advisable and expedient to do this or, at least, to postpone consideration of the instant case until the garnishment case had ended. In Finch v. Alexander County National Bank, 65 Ill. App. 337, the same fund was garnished by two parties and it was there held that the proper practice should require

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that the court suspend final judgment or stay proceedings in the second case until after the termination of the first, inasmuch as the first suitor might not succeed in holding the fund and it should then be subjected to the second garnishee's claim. We are of the opinion that some such practice should have been followed in the present case.

Plaintiff in his brief requests that the appeal be dismissed for various matters in relation to the appeal bond and the bill of exceptions. As such matters have no proper place in the brief but must be presented to the court by motion, they will not be entertained. Various other matters are argued which it is not necessary to discuss, as we are of the opinion that it was error to strike defendant's second amended affidavit of merits. Defendant is entitled to a trial. The judgment is therefore reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

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33459

JOSEPH FISHER,
Appellee,

vs.

JOSEPH MEUBERG,
Appellant.

APPEAL FROM CIRCUIT COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURLEY
DELIVERED THE OPINION OF THE COURT.

Defendant seeks the reversal of a judgment against him for \$85 in a case tried by the court wherein plaintiff sought to recover the value of a suit of clothes which he had made and delivered to defendant.

Defendant argues that the weight of the evidence shows that the suit was to be paid for ^{by} and charged to ~~Wolfsohn~~ instead of the defendant. Plaintiff testified that he met defendant and Wolfsohn a few days previous to the time he sold the suit of clothes; that subsequently defendant and his wife called at plaintiff's store and defendant was shown fabrics and made his selection; that plaintiff took his measure for the suit and made and delivered it to the defendant; that defendant was recommended as a customer by Wolfsohn, who was also a customer of the plaintiff; that thereafter plaintiff sent bills and statements for the suit to defendant. Wolfsohn testified that he introduced defendant to plaintiff and told plaintiff to make a suit of clothes for defendant and to charge the same to him, Wolfsohn. Defendant also testified to the same effect. Plaintiff testified in rebuttal that the suit was charged to defendant on his books of account; that the ledger sheet is a record of the sale, date and delivery of the merchandise to the party to whom it was sold. This ledger sheet was in plaintiff's handwriting and contains the entry that the suit was sold to defend-

ant; that thereafter plaintiff sent monthly statements to defendant and demanded payment; these statements never were returned to plaintiff; that never prior to the time he placed the claim in the hands of his attorney for collection had he been informed by either defendant or Wolfsohn that the suit was to be charged to Wolfsohn.

It is conceded that defendant ordered the suit and received and wore it. As to whether plaintiff agreed to charge it to Wolfsohn's account depends upon the credibility of the witnesses whom the court saw and heard testify, and therefore was in a better position to judge of the truthfulness of the variant stories than are we. We cannot say that the finding is manifestly against the weight of the evidence and the judgment is therefore affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

33468

E. BERG,

Appellee,

vs.

CHARLES E. FIELD,
Appellant.

APPEAL FROM THE COURT
OF CHICAGO.

MR. PRESIDING JUDGE CASBURY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of the fourth class against Charles E. Field and later the Standard Light Company, a corporation, was joined as an additional defendant. Upon trial by the court he had judgment against the defendants for \$349.38. From this judgment Field alone appeals, claiming that the indebtedness sued on was the indebtedness of the Standard Light Company alone; that the money was delivered to the corporation and that he was merely the agent for it.

Plaintiff testified that in August, 1925, defendant Field asked a loan of \$300 for six months; that plaintiff agreed to make Field this loan and withdrew the money from his bank deposits and gave the same to Field, receiving a receipt as follows:

"August 11th, 1925, Pen. 250. Received of E. Berg as a loan the sum of Three Hundred Dollars (\$300.00). Standard Light Co. by Chas. E. Field."

Plaintiff at that time was working for Field and had been working for him for about a year previous; during part of the time Field had been doing business under the name of Field Electric Company; that plaintiff had never heard of any corporation such as the Standard Light Company, and that, while he noticed this name on the receipt, he supposed it was a trade name under which Field did business and that Field did not tell him anything about the corporation; that after six months had expired he asked Field for the repayment of the loan. He asked him about twenty-five times, but

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Field always made the excuse that he did not have the money because he was not working and that he would pay later. Field did not say on any of these occasions that it was the corporation and not he that owed the money. Field does not substantially deny this testimony. His defense seems to rest on the fact that the Standard Light Company was incorporated February 27, 1925, and the certificate of incorporation recorded in the Recorder's office of Cook county March 6, 1925.

The evidence clearly shows that the transaction was between plaintiff and the defendant Field; the loan was solicited by Field as a personal loan and made to him as such. Even without the written receipt, plaintiff was entitled to recover from Field personally. The receipt was merely evidence of the loan.

Even if the corporation was improperly joined with Field, he cannot complain of this. The judgment was entered against the corporation by default, and, if improperly entered, the corporation may complain. Field cannot complain of that which merely affects another party who is not complaining. Press v. Woodley, 160 Ill. 433; Henricksen v. VanWinkle, 21 Ill. 274. As the evidence clearly shows, defendant Field is liable and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

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MRS. W. B. McCULLOUGH,
Appellee,

vs.

CHARLES A. WHITE,
Appellant.

APPEAL FROM CIRCUIT COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McCORMICK
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment in a forcible detainer suit tried by the court. Plaintiff's claim alleged the unlawful withholding of possession of the first floor, east apartment, in the building 411 East 48th street, Chicago.

It is conceded that defendant occupied the premises and plaintiff introduced evidence tending to show that they were used by the tenant for the purposes of assignation and prostitution. Two witnesses testified that they were investigators who called at different times at the premises in question, and they gave evidence tending to support the charges of unlawful use of the premises. One of these witnesses testified that on the occasion of his visit he had an interview with a woman who the witness identified as the defendant's wife, Mrs. White, although the identification was not unqualified. After a conversation with the woman, she gave the witness a card in her own handwriting. Although the card was not formally introduced in evidence, it appears from the statement of the witnesses and of the court that it contained the words: "Lola - 411 East 48th Street - Apartment One - Kenwood 1757." Mrs. White testifying denied that she ever gave him the card in question and testified that the handwriting thereon was not her handwriting and that she never went by the name of Lola. The court thereupon had her write the same words and figures that were on the card and evidently, after comparing the handwriting, the court announced his opinion that Mrs. White had

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written the card given to the investigator and found in favor of the plaintiff.

While the certificate to the bill of exceptions states that it contains all the evidence heard and considered by the court, it is apparent that this is a mistake. The card and the paper upon which the defendant wrote in the presence of the court are neither of them in the bill of exceptions, and yet this was the decisive evidence in the case.

It also appears that the owner of the premises received a certain notice from the State's Attorney of Cook County, which was ⁱⁿ offered evidence. This notice does not appear in the bill of exceptions.

It is the well established rule that a bill of exceptions is to be considered as a pleading of the party who presents it and is to be construed most strongly against the party preparing it, who must be responsible for all uncertainty and omissions therein. The party guilty of the omission must be the sufferer and not the opposing party; and a court of review will presume that the decision of the lower court could be justified by the evidence not shown, if that shown was not sufficient. Whitley v. Rule, 230 Ill. App. 218; Garrity v. Hamburger Co., 136 Ill. 499; Johnson v. Johnson, 127 Ill. 86; Peoria Star Co. v. Lambert, 115 Ill. App. 319. Therefore, we must assume that if all the evidence considered by the trial court had been presented to us it would have justified the conclusion of the court. Under the circumstances we can only affirm.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

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MARTIN LANGGUTH,
Appellee,

vs.
PAUL SCHULTZ,
Appellant.

APPEAL FROM THE DISTRICT COURT
OF COLUMBIA COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$1128.60, entered upon the verdict of a jury. Plaintiff has not filed a brief, but that of defendant contends that the judgment should be reversed because of improper evidence admitted over objection, because of erroneous refusal to give proper instructions requested by defendant, because the verdict is against the manifest weight of the evidence, and because the motion of defendant for a new trial should have been granted.

The suit was in assumpsit on the common counts; defendant filed a plea of the general issue, and plaintiff, conforming to an order of the court, filed a bill of particulars. Defendant thereafter by leave pleaded the statute of limitations.

The bill of particulars disclosed a claim of four items: (1) an alleged overpayment of \$105 for rent in the year 1922 for premises leased to plaintiff by defendant; (2) services for taking care of a hot water heater and in doing general cleaning in and about the premises from October 1, 1918, to September 9, 1926, for the agreed sum, as alleged, of \$10 a month, amounting to \$957.50; (3) services for decorating and painting the barber shop occupied by plaintiff and certain rooms in the rear of the same from 1922 to 1925 at \$75 a year, amounting to \$350; (4) sums advanced by plaintiff for hardware used in defendant's building from 1924 to 1925, amounting to \$26.10, making a total of \$1383.60.

The verdict as originally returned was for the full amount claimed, but afterwards the court required a remittitur of \$255.

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The record shows that \$105 of this amount represented the claim for overpayment of rent, and the rest one-half of the item claimed for decorating and painting.

There was evidence tending to show that plaintiff was the tenant of defendant and occupied the premises known as No. 907 South Oak Park avenue from September, 1918, to September 15, 1926. No. 907 was a part of the building owned by defendant, and in addition to No. 907 the building included nos. 909 and 911. No. 907 was used as a barber shop with living rooms in the rear, and it had a gas heater which was used to supply hot water for the barber shop. The entire premises seem to have been heated from No. 911, and defendant employed a janitor to care for the entire premises.

Only one lease between the parties is in evidence, although it would seem that several were signed during the period plaintiff occupied the premises. By the lease in evidence defendant demised the premises known as No. 907 to plaintiff, to be used as a barber shop, with living rooms, for a period extending from May 1, 1922, to April 30, 1923. The lease contains a clause reciting that the tenant has examined and knows the condition of the premises and has received them in good order and repair, and that he agrees upon the termination of the lease to deliver up the premises in the same condition.

It also appears from the evidence that on August 14, 1922, defendant by bill of sale transferred to plaintiff the fixtures in the barber shop at the agreed price of \$400, - 350, the writing recites, to be paid at the signing; and it was agreed that the balance should be paid in monthly instalments of \$5 each, beginning September 1, 1922, together with interest at 6% upon unpaid balances. On September 9, 1926, plaintiff paid defendant the sum of \$168.94, and the bill of sale was on that date receipted as paid in full.

The defendant testifies (and plaintiff does not contra-

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dict him on this point) that at this time plaintiff was selling the barber shop and fixtures and told defendant and asked him if he would consent; that defendant told him that that was all right and he would give his consent to the assignment of the lease, but "You will have to pay the balance that you owe on the fixtures before I consent to the sale and before I consent to assign the lease. I want all my money you owe me." Defendant further says (and his testimony is not denied) that plaintiff said he was selling for cash and would have to allow \$50 or \$75 for cleaning and asked defendant if he would allow him that; that defendant said, "No, all I want is what rent is due up to that time and the balance on the fixtures;" that several days thereafter plaintiff paid the balance, as already recited, and said, "Now we are squared up." Defendant's testimony further is: "I said, 'Yes, everything is squared up.' That was on September 9, 1926. I signed my consent to assign the lease. He paid me at the time \$168.94. I then marked the bill of sale 'Cancelled, paid in full.' I signed it and Mr. Langguth signed it, and everything was settled."

Without discussing all the evidence in detail, it is sufficient to say that the case for plaintiff, insofar as the services for caring for the hot water heater and the services in decorating and painting are concerned, rests upon exceedingly improbable evidence given by himself and a young daughter, who had apparently little knowledge of the matters concerning which she undertook to testify. We find it difficult to believe that, while plaintiff was in arrears in the payment for fixtures and at times in arrears for the payment of rent, he allowed all these items to run along without ever presenting a statement of account or specifically making demand for the amounts which he now claims. It has already been stated that he has not filed any brief. Under rule 19

we therefore have a right to assume that the statement of the case made by the appellant is accurate, and assuming this he is entitled to a new trial, which should have been granted.

For the error indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

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CHARLES A. ANDERSON,
Appellant,

vs.

LAKE MICHIGAN BUILDING CORP.,
a Corporation, et al.,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff brought an action on the case for personal injuries against the Lake Michigan Building Corporation, the owner of a building, and Paschen Brothers, contractors, who were erecting the building.

There was a trial by jury and a verdict of not guilty as to the owner and a verdict of guilty as to the contractors with damages assessed against them for \$3,750. The court overruled the motion of plaintiff for a new trial and entered judgment in favor of the defendant owner and against the contractors for the plaintiff in the amount of the verdict.

The case against the building corporation went to the jury under the first additional count of the declaration which charged a violation of sections 123 and 132 of the Revised statutes, which in substance require that scaffolds erected for use in building operation shall be constructed in a safe, suitable and proper manner so as to give adequate protection to life and limb of any person or persons employed or engaged thereon, or passing under or by the same. A special interrogatory was submitted to the jury, as follows:

"Did the plaintiff prove by the preponderance or greater weight of the evidence, under the instructions of the court, that the scaffolding mentioned in the plaintiff's declaration was used in the erection of the building in question, and that it was not erected and constructed in a safe, suitable, and proper manner, and that it was not so erected, constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons passing under or by the same, and in such manner as to prevent the falling of any material

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that might be used or deposited thereon?"

The jury answered this interrogatory in the affirmative. Plaintiff argues that this answer was inconsistent with the general verdict and that the general verdict should therefore have been set aside.

If, in the opinion of plaintiff, the answer to the special interrogatory was inconsistent with the general verdict, plaintiff should have moved for judgment thereon, as provided by the statute. (See sec. 79, chap. 110, Rev. Stat.) He did not do this, and, we think, thus failed to preserve this question for review.

Moreover, the statute in question provides for liability of the owner only in case of a wilful violation of its provisions. Griffiths & Sons Co. v. Nat'l Fireproofing Co., 310 Ill. 331. The interrogatory therefore did not relate to any ultimate fact in the case. It only called for the opinion of the jury on mere evidentiary facts, and the answer was therefore not necessarily inconsistent with the verdict of not guilty. Wicks v. Cunap-Hennsberry Co., 319 Ill. 344; Van Meter v. Gurney, 240 Ill. App. 165; People v. Span, 241 Ill. App. 189.

Error is also argued on instruction No. 12 given by the court at the request of defendants, which was:

"The court instructs the jury that you should bring to the consideration of the evidence before you your every day common sense and judgment as reasonable men, and those just and reasonable inferences and deductions which you as men would ordinarily draw from the facts and circumstances proved in this case, you should draw and act upon as jurors."

This instruction is criticised because it is said it did not limit the use of common sense on the part of the jury by the phrase "under the instructions of the court." Danmore v. The State, 67 Ind. 306, is cited.

The instruction is further criticised because it is said that it failed to contain a statement directing the jury to use their common sense and judgment "as reasonable men." It is

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urged that the instruction left the jury to decide the facts without a consideration of the evidence.

We are not impressed with these contentions. In the later case of Wright v. The State, 69 Ind. 163, the opinion of the court intimates that if this instruction had limited the jury to the consideration of the weight of the evidence, it would not have been subject to criticism. (See also Tinnis v. Wade, 5 Ind. App. 139.) An instruction of a somewhat similar nature was approved by the Supreme court in People v. Turner, 265 Ill. 594, and the precise objection made was held unavailing in Roxie v. Pfaltzer, 167 Ill. App. 79. (See also Springfield Ry. Co. v. Hoeflner, 176 Ill. 634.) A recent expression of the Supreme court in Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207, seems applicable to the situation. The court said:

"The test, then, is not what meaning the ingenuity of counsel can at leisure attribute to the instructions, but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions."

The instruction complained of does not direct a verdict. It merely states an abstract proposition of law, and even if there is technical error in the instruction, it is not necessarily ground for reversal.

The plaintiff makes the further claim that the damages allowed are inadequate, and this contention makes necessary a consideration of the facts bearing on that point.

The plaintiff received the injury of which he complains on the morning of August 2, 1936, while he was walking west on the south side of Lake street in the city of Chicago, when, he says, a shower of parts of bricks fell, one of which hit him on the head. He was wearing a straw hat at the time which was introduced in evidence and has been certified as an exhibit to this court. The brick cut through the top of the hat and the lining. He says

he removed his hat, put his hand to his head and found that it was bleeding. At the suggestion of someone he walked into the office of the building and complained that he had been injured. The blood was washed off there and he was sent with an employee to the office of the contractors' doctor at 5 North Tabash avenue, where x-rays of his head were taken, the wound cleansed, treated with mercurochrome and covered with gauze. Plaintiff then walked back to his son's office in the Wrigley building and his son took him home.

Thereafter, plaintiff saw Dr. Halzauer, a personal friend as well as his physician. Dr. Halzauer says that there was a wound on plaintiff's head about an inch long and that it appeared to be down to the scalp, as deep as to the bone.

Dr. Goldsmith, who saw the wound on August 11th, says that plaintiff had a dressing on a one inch scalp wound.

Dr. Saunders describes the wound as about $3/4$ ths to $1\frac{1}{2}$ inch long and down to the periosteum, the covering of the bone, and states that there was an adhesion at the point of the wound.

Dr. Larson, the contractors' physician, describes the wound as a small laceration of the scalp and says that he gave the usual treatment, which was to shave the part, examine it carefully for any foreign bodies, clean it off and antiseptize it and dress it.

Dr. Ellis, an associate of Dr. Larson, who also examined the wound, says that it was about an inch long, $1/10$ th to $1/16$ th of an inch deep and not to the bone.

In addition to the physicians already named, plaintiff consulted Dr. C. C. Rogers and Dr. Yudelzen, and he was for 21 days at the Mayo Brothers clinic, going there with his son on January 15, 1927.

Plaintiff testifies that his feelings from August 2nd were "almost indescribable." He was in constant pain which never

left him. The pain was inside his head from the side of the center going down into his neck and on the right side. He first noticed this pain a couple of days after the accident when he went to Dr. Saunders. He says the pain "feels at times as though there isn't room enough inside," as though the base of his skull was going to be lifted up, and it works down into his neck. His head feels too heavy for his neck; he cannot hold it straight. It is almost impossible to go to work and bear a collar on it, and the pain extends down his neck as far as the shoulders. He has not worked since the accident.

X-rays of his head were first taken by Dr. Larson, then by the defendants at the Alexian Brothers hospital, by Dr. Goldsmith at the Wesley hospital, by Dr. Rogers at the University hospital, by Dr. Saunders and at the Mayo Brothers clinic.

He held an accident insurance policy in the Metropolitan Life Insurance Company, and Dr. Allen of that company examined him for the purpose of ascertaining his disability. That company has been paying plaintiff \$25 a week under the terms of the policy for total disability. Dr. Read, on behalf of the defendants, examined plaintiff in March, 1927, and testified in the case.

It is admitted that none of the X-rays showed a skull fracture. These thorough physical examinations disclosed that his reflexes were normal. He lost practically nothing in weight. Prior to the accident he had been in the tailoring business for 30 years, but at the time of the accident he was selling real estate on a commission basis. The amount of his earnings was somewhat indefinite and uncertain.

Dr. Rogers recommended that a plate of skull be taken out of plaintiff's head and a new piece be allowed to grow in. Plaintiff did not, however, submit to this operation. In response to a hypothetical question Dr. Rogers said that an injury to the

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

top of the head without a fracture of the skull or even without a laceration of the tissues, could produce trauma enough to injure the structure on the inside of the skull causing a hemorrhage between the dura mater and the bone, which not being absorbed would become like lime and produce an irritation. The dura mater is a very sensitive structure, and its injury could produce a condition such as that of which plaintiff complains. Other doctors disagreed as to the wisdom of an operation. Dr. Hall, testifying for defendants, stated that it would be bad practice; that he considered it a "dangerous and reprehensible practice."

About a week after the accident, on August 9, 1926, plaintiff was walking along the sidewalk at Lawrence avenue and Sheridan road near another building and was struck by another falling object, which, he says, cut the rim of his hat and cut him above his right eye. This wound was dressed by Dr. Saunders, who described it as a little scratch wound on the front part of the head. Plaintiff made claim for damages on account of this injury and settled with a liability insurance company for \$200. Something was said at the time of this settlement about plaintiff collecting other damages from defendants Paschen Brothers, and the agent who settled with plaintiff left his card and said that he "would be glad to help us collect in that case if we needed his services, - and we should get in touch with him."

In response to a hypothetical question Dr. Read testified for the defendants as a specialist in mental and nervous diseases and said there was no connection between the injuries described and the sensation described at the time of his examination in March, 1927. He said:

"As to my reasons - I don't know of any injury to the nervous system that could be produced in the manner - that could be produced in the manner described that would produce a persistent condition of feeling pain and so forth, as described. I just simply don't know how it could happen. There is no ana-

for the purpose of the investigation.

The investigation of the case was conducted by the

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tomical condition that would explain the matter. I did not discover at the time of my examination any physical condition which indicated brain or nerve injury."

Dr. Read said further that he was impressed by the fact that the symptoms did not develop until at least a week after the injury; that ⁱⁿ an actual contusion of the brain he would look for that to develop immediately, and that his conclusion was that the patient "had had time to think the matter over and the symptoms had developed along with that thinking the matter over. . . . I would be rather inclined to think that such a -- that in such a case, the injured person had considered the question of compensation for damages received and that out of this thought bodily symptoms developed. They were not real symptoms but inspired or brought about by the wish to collect damages. That is what I mean; that the body was influenced by the operation of the mind; that either one or two things happened. They are both practically the same thing. That in order to receive compensation symptoms must be present. Therefore, the symptoms appeared."

It is significant, as defendants point out, that not one of the numerous physical examinations by the physicians disclose a single objective symptom which would indicate that plaintiff was suffering from any ailment. The conclusion that plaintiff was suffering pain at all seems to rest entirely upon his own description of a subjective condition. His case seems to be one that has baffled the efforts of the most advanced medical scientists to find the physical reason for his suffering. There is nothing in the circumstances of his injury to indicate that it was severe. He was not knocked down. He apparently walked first to the office of the building, then to the office of the doctor, and from there to his son's office, without difficulty.

Under the facts as related the question of whether plaintiff has suffered pain to any considerable extent rests en-

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tirely on his own statement of a subjective condition, and assuming the existence of pain, the question of whether the injury which plaintiff received was or was not the cause of it, seems, notwithstanding medical testimony on both sides of high character, to rest in the realm of pure speculation.

Under these circumstances this court is of the opinion that it ought not to disturb the verdict of a jury approved by the trial court. There is no reversible error in the record, and the judgment is affirmed.

AFFIRMED.

McSurely, J., and O'Connor, J., concur.

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WILLIAM P. MEYERS,
Plaintiff in Error,

vs.

CHICAGO CITY RAILWAY COMPANY
et al.,
Defendants in Error.

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ERRATA TO SUPREME COURT
OF ILLINOIS.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff appeals from a judgment in his favor for \$300 entered upon the verdict of a jury. The action was in case for alleged negligence because of which plaintiff was injured.

The accident occurred May 10, 1927, when two of defendant's cars, in one of which plaintiff was a passenger, collided.

It is contended that the court erred in excluding evidence of a supposed statement by one of the conductors made to a witness for plaintiff, Mrs. Goodrich, with reference to the condition of defendant's tracks prior to the accident. The supposed statement was made about eight minutes after the collision and was not offered by way of impeachment. It was not a part of the res gestae. Chicago City Ry. Co. v. White, 110 Ill. App. 23; Lawnside Steam Dye Works v. Chicago Daily News Co., 189 Ill. App. 565; Cooke Co. v. Miller Brewing Co., 316 Ill. 46. The court did not err in excluding this evidence.

It is urged that the court erred in sustaining an objection to testimony offered by plaintiff tending to show that prior to the accident he had been examined as an applicant for life insurance by a physician, who failed to find that plaintiff was afflicted with hernia. If the plaintiff wished to show this fact, the physician who made the examination should have been called. Plaintiff's evidence as to what the physician said he found was pure hearsay.

It is also urged that the court erred in refusing to allow Dr. Schaeffer to testify with reference to a contusion and

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hernia which he found on the morning of the accident, "whether or not the blow that must have been the cause of that could have produced a hernia." The question, if allowed, would have permitted the witness to state his opinion on one of the ultimate facts which was for the jury. Schlauder v. Chicago & So. Tract. Co., 253 Ill. 154; People v. Schultz, 260 Ill. 35; Kimbrough v. Chicago City Ry. Co., 272 Ill. 71. As these and many other cases hold, our Supreme court is committed to the doctrine that an expert witness may not testify to the ultimate fact which is for the jury. The rule may be highly technical, but it is the law of this state. The court did not err in excluding this evidence.

The same rule also required the exclusion of an answer by Dr. Goldsmith, one of plaintiff's witnesses, to the question as to whether there was "ever a recurrence of hernia after operation."

Plaintiff also complains that the court struck out his statement that since the time of an operation performed some time after the accident he had been troubled with gas in his stomach. It was stricken apparently on the theory that no causal connection had been shown with the accident. It should not have been stricken but we do not think the error serious enough to demand a reversal.

Complaint is made of several instructions, which are not set out in the brief as required by the rules of this court. Moreover, these instructions are all directed to the question of defendants' liability. As the verdict ^{was} for plaintiff on that issue, such instructions were harmless even if erroneous.

The controlling question in the case is raised by plaintiff's contention that the damages allowed are inadequate and that the court should have granted a new trial for that reason. Defendants insist that this contention depends entirely upon the question of whether a clear preponderance of the evidence tended

to show whether a double hernia which plaintiff suffered after the accident was or was not caused by the injury he sustained at that time. At any rate, the argument makes necessary an examination of the evidence tending to show the extent of the injuries plaintiff sustained.

The accident in question occurred May 10, 1927; plaintiff was at that time about 35 years of age; he weighed 163 pounds, and the evidence tends to show that he was in good health prior to the accident.

Plaintiff testified (and his ^{testimony} is not contradicted upon this point) that he was sitting on the right-hand side of the car in which he was a passenger in about the fourth seat from the front; that he saw a flash and the motorman said the car was out of control, and that the collision knocked him forward to the next seat and over the seat which was turned. The only thing he remembers afterwards is being taken to the patrol wagon and then to the hospital, where he was examined and his hand bandaged. About twenty minutes after the examination he was taken home; he was in bed for a week and did not go to work until August. After the accident his side was swollen just below the navel; there was a bruise, a blue mark; it was swollen a little larger than a good sized marble on both sides; there was a bruise on his hip, a blue mark about an inch and a half long; he has a weakness in his body; he can't take up and lift from the left; if he does he gets a pain in the stomach; has trouble with his urine, has to get up practically every hour during the night. Since 1919 he has been working for Wagner-Winslow, earning \$46 a week and from \$5 to \$10 a week for overtime. His employers sell provisions wholesale and retail; plaintiff drives a two-ton truck, helping to load and unload it, requiring him to lift and carry packages, some of which weigh as much as 100 pounds. His fellow-workers have had increases in their wages, but he could not

get such increases because of inability to do the work.

About four weeks after the accident plaintiff was examined by defendants' surgeon at defendants' office. At the end of four weeks he went to the Martha Washington hospital where he was operated on for hernia by Dr. Howard Goodsmith. He remained at the hospital about 15 days; the operation was to correct a hernia on both sides.

Plaintiff says that he called the bruises on his stomach to the attention of Dr. Schaeffer between eight and eight thirty o'clock on the morning of the accident, and that Dr. Schaeffer told him he ought to be operated on.

Dr. Schaeffer testified that his examination on May 10, 1927, disclosed a contusion and discoloration over the lower part of the abdomen, more to the right side; that the condition was an inflammatory condition as the result of a blow; that on further examination he found a slight right inguinal ^{hernia} commonly known as a rupture just above the groin, and that was the only injury he recalled, but that plaintiff complained of other parts of his body, his shoulder or head, and had some bandages on. Dr. Schaeffer said:

"I made a medical examination of this man's lower abdomen and found a right inguinal hernia, a rupture. There is a ring in the abdomen wall through which the spermatic cord comes from the wall down into the testicles. This ring closes before birth, sometimes completely and sometimes not completely, and a pressure or any traumatism - by traumatism I mean injury or blow within or without - may open up this ring and produce a hernia. In Mr. Meyers this ring was enlarged, large enough to let through a part of the peritoneum with some tissues of some kind following, very likely the intestines. By peritoneum I mean the lining of the abdominal wall. The peritoneum is the sac that lines the abdominal wall. It is necessary for it to have some point of least resistance or opening when it goes through, and that produces a rupture or hernia."

Dr. Goodsmith stated that on examination of the inguinal rings he saw a distance impulse on both sides; that there was a hernial sac coming down into the rings, which was pathological; that he performed a double herniectomy on the man under local anesthesia, and that he operated on both sides and felt that he got a complete

cure. His bill, which was fair and reasonable, was \$150, and the hospital also presented a fair and usual bill of \$88.25 for services rendered.

Two policemen testified, stating in substance that they were in charge of the ambulance which took plaintiff to the hospital; that he was conscious and walked to the wagon with assistance, and walked to the wagon from the hospital and from the wagon to the house without assistance.

Medical experts for the defendants testified that in the male prior to birth the testicle, which lies under the kidney during foetal life, descends and occupies a position outside of the abdominal and pelvic cavity in the scrotum; and that furnishes the tract through which a hernia occurs or develops, and that part of the tract from the point of origin on the inside of the abdominal cavity to this point of emergence on the outside is called the inguinal canal; that this transmits the duct of the testicle, which carries the seminal fluid through the canal into the floor of the urethra; that this occupies this inguinal canal and the portion of muscle carried down from the muscles of the belly walls forms part of the investing membrane of the scrotum, which envelops the testicle, the artery of the testicle and two veins that come back to the testicle and a certain nerve which runs down to the testicle, and certain lymphatics and investing meshwork of connective tissue make up the structure that is called the spermatic cord, which is approximately about the diameter of an ordinary lead pencil; that an indirect inguinal hernia, perhaps more commonly called oblique hernia, from the indirect location which it takes in making its passage through the belly wall, comes out from the inside of the abdomen at one point and travels down between the muscles a distance of an inch and a half or so and emerges at the outer or external ring; that an inguinal hernia means that it is developed to a point

where it is more than one inch in diameter across the swelling of protrusion on the outside; that seven different layers that constitute the belly wall have been carried before, and including the intestine, the bowel which has gradually forced a disgle at the point of the inside end of the inguinal canal on the inside and carried with them these other seven structures; that the first is the lining of the belly, the peritoneum, which is a thin, dense, inelastic white connective tissue structure and exceedingly sensitive, one of the most sensitive structures of the human body; that beyond is a layer of lesser connective tissue, then a layer of muscle derived from the muscles of the belly wall and the other coverings of the belly wall all the way down to the outside, and especially connective tissue structure which closes the outer opening of the inguinal canal.

In answer to hypothetical questions these experts state that it would be absolutely impossible for that substance, by a single act of violence, or a single act of any kind, to be carried that distance down through there and not tear through the peritoneum itself; that the effect on the individual of a tearing or laceration of the tissues so as to allow a piece of the bowel to protrude would involve, first, the tearing of this sensitive peritoneum and the tearing of other structures that form the outer coverings of an oblique inguinal hernia, which would produce immediate surgical shock; that the individual would collapse and a hemorrhage would be produced, and that all the symptoms of surgical shock would appear - a cold, clammy skin, cold beads of perspiration, rapid thready pulse, interference with respiration, disturbance of the heart action and immediate total disability when and there; that it would be impossible for the injured to do anything except to lie in his tracks in a condition of profound surgical shock, which would require immediate surgical attention.

They further testify that all kinds of hernia have a gradual development; that a single act of violence, a blow upon

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the groin, would be one of the contributory causes to an indirect inguinal hernia; that every blow or pressure that occurs in a period of years would be a contributing cause.

We think the answers of these experts to hypothetical questions had a tendency to confuse the jury, since the questions asked assumed a situation where a hernia was developed instantly as the result of a blow. It would undoubtedly be true that a blow which produced such a result where there had been no prior development of the hernia would necessarily result in the condition described, which would demand immediate surgical attention, but it by no means follows, assuming a condition tending progressively to produce a hernia, that a blow might not result in accelerating this progressive development without producing the immediate profound effects which the jury might have inferred from the answer of the experts. Defendants' surgeon, who examined the plaintiff at his office, did not testify, and defendants produced no occurrence witness. Whether we regard the hernia and the operation made necessary by it as caused or not caused by the injury which plaintiff sustained, we think the damages allowed are inadequate, and we also think the manifest preponderance of the evidence on this record is that the hernia was the natural and probable effect of the injury sustained by plaintiff in the accident.

For the reason that the damages allowed are inadequate, the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, F. J., and O'Connor, J., concur.

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33403

GEORGE VOGEL,
Appellee.

vs.

THE CLEVELAND, CINCINNATI,
CHICAGO & ST. LOUIS RAILWAY
COMPANY,

Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in the sum of \$1,750, entered upon the verdict of a jury after motions for a new trial and in arrest had been overruled.

The declaration averred that plaintiff delivered to defendant at Detroit, Michigan, on September 11, 1926, a horse named "Guy Hall," used and known as a race horse; that the horse was delivered in good condition to be transported to Sidney, Ohio, under contract or bill of lading, ^{under} which it was defendant's duty to transport and deliver the horse in an uninjured condition; that defendant delivered the horse in an injured condition to plaintiff's damage. Attached to the declaration was an affidavit of claim, evidently framed with the thought that section 53 of the Practice act was applicable to the case.

The defendant filed a plea of the general issue, to which was attached an affidavit of merits, which was thereafter withdrawn, and plaintiff's affidavit of claim was stricken (properly, we think) since the action was for unliquidated damages. However, while the action of the court in striking plaintiff's affidavit is argued as error, the ruling was not preserved by bill of exceptions. Additional counts were filed during the trial, and defendant's plea of the general issue was allowed to stand.

There is little controversy as to the material facts bearing on the question of liability.

On September 11, 1926, plaintiff delivered to a connecting carrier, the Detroit & Toledo Shore Line Railroad company at Detroit, Michigan, this horse for shipment over defendant's lines to Sidney, Ohio. The carrier on that date issued to plaintiff a uniform live stock contract, as prescribed by the Interstate Commerce Commission. Under the terms of this contract the shipper is required to make a classification of the live stock shipped either as ordinary live stock, which means all cattle, horses, etc., "except such as are chiefly valuable for breeding, racing, show purposes, or other special uses," or other than ordinary live stock, which consists of stock "chiefly valuable for breeding, racing, show purposes or other special uses." The contract also states that different rates of freight are in effect, dependent on the valuation placed thereon by the shipper. This valuation may be the basic valuation as stated in the classification at which the lowest freight rate applies, or it may be any higher valuation up to actual value, in which event the freight rate is higher by the amount prescribed in the tariffs or classifications. The contract provides that the declared or agreed values shall be entered in the column provided therefor in the contract and bill of lading, and in no event shall the carrier be liable for any amount in excess of such valuation. The shipper was not required to declare the value for ordinary live stock, but for other than ordinary live stock such declaration was necessary. In the contract made out by the agent of the carrier and accepted by the shipper the horse was described as "ordinary," and the rate of freight charged by the carrier was the rate for ordinary freight.

While on the line of defendant this horse was negligently injured. The injury affected the right hip joint, muscles were bruised and ligaments torn loose, and the horse walked out of the car at destination on three legs. The horse was treated by

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IN THE YEAR 1649

BY JOHN BURNET

OF THE UNIVERSITY OF OXFORD

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veterinaries for his injuries, participated in eight races in 1927 and won several races in 1928.

The tariffs of defendant, then on file with the Interstate Commerce Commission provided that the rate for transportation of one ordinary horse from Detroit to Sidney should be \$6½¢ per hundred pounds with a minimum of 4,000 pounds for stallion or 3,000 pounds for mare or gelding. "Guy Hall" was a stallion and his weight is stated to be 3,000 pounds.

It is the contention of defendant that plaintiff having accepted a bill of lading which classified this horse as an ordinary horse and paid freight at the rate provided for ordinary horses, he is limited as to the damages which may properly be recovered to the valuation of the horse as an ordinary horse, and that the verdict of the jury is therefore excessive.

It is also urged that the liability of the defendant carrier should be determined by computing the difference in the market value of an ordinary horse at the destination to which he was shipped (if he had been delivered in an uninjured condition,) and of the horse in the injured condition in which he had been delivered at the same place, and it is insisted that there is no competent evidence in the record to which this rule may be applied other than that of a witness produced by the defendant.

A veterinary surgeon who practiced his profession at Sidney, Ohio, testified that he knew the market value for ordinary horses at that place, that such value for this horse in an uninjured condition would have been \$200, and that it was of no value in the condition in which it was delivered.

Defendant also contends that the verdict is against the manifest weight of the evidence and that the court erred in refusing to give an instruction requested by the defendant.

The brief of the plaintiff is devoted largely to the

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argument of alleged cross-errors, but his motion for leave to assign such errors came too late and was denied, and we have difficulty in understanding why the argument as to these cross-errors is presented. In the course of the argument, however, we are cited to a number of cases, such as Adams Express Co. v. Darden, 265 U. S. 266; B. & O. R. R. Co. v. Piper, 246 U. S. 439; Fuller v. L. S. & M. S. Ry., 163 Ill. App. 279, holding in substance that a common carrier may not by contract limit the amount of its liability. These cases, however, all arose at a time when a different statute from that which now controls was applicable. These decisions construe what is known as the first Cummins amendment, which forbade any common carrier to limit its liability by contract, except as to goods hidden from view or where the carrier was not notified as to the character of the goods. However, by the later act, known as the Cummins Amendment, U. S. Comp. Stat. sec. 3604A and sec. 3604AA, the distinction between ordinary live stock and other ^{than} ordinary live stock was defined, and the prohibition as to the limitation of liability was made applicable to ordinary live stock alone but not to other than ordinary live stock. It is unnecessary to recite the history leading up to the enactment of this second Cummins amendment. It is given quite fully in the case of Peery v. Norfolk & W. Ry. Co., 124 S. E. 230, by the Supreme Court of Appeals of Virginia. That amendment is applicable to this shipment, and as construed by the Supreme Court of the United States, the plaintiff having accepted a bill of lading and contract which described his horse as "ordinary," is now estopped under its provisions to claim damages for the injuries other than to an ordinary horse. American Ry. Express Co. v. Lindenburg, 260 U. S. 584.

There was some evidence in the record given by plaintiff and his son in response to questions as to the value of the horse for

ordinary purposes at Sidney, Ohio, to the effect that such value was from \$2500 to \$3,000. The cross-examination shows, however, that these witnesses did not know the cash value of ordinary horses at that place.

Evidence was also admitted as to the value of the horse as a race horse and also as to the expense for treatment necessary after his injury. This evidence was (we think, properly) stricken out, and the defendant requested the court to instruct the jury to ignore and disregard all evidence as to the value of the horse as a race horse and also all evidence as to expense and disbursement in curing the horse of the injury sustained. The instruction, we think, should have been given.

However, the evidence for defendant tends to show that this horse as an ordinary horse uninjured was worth \$200; that after he was injured he was worth nothing. This would indicate damages to the amount of \$200.

If the plaintiff will remit within ten days the sum of \$1550 from the amount of the judgment, it will be affirmed for the sum of \$200; otherwise, the judgment will be reversed and the cause remanded for another trial.

AFFIRMED UPON REMITTITUR; OTHERWISE REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

33435

JOHN J. COLLINS,
Appellant,

vs.

MRS. MINNIE FREER,
Appellee.

250 - 244
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE LATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the plaintiff from an order entered at the January term of the Circuit court upon motion of defendant setting aside a judgment in favor of the plaintiff theretofore entered by default at the November term of the same court.

The facts are in brief that on October 25, 1928, and more than ten days before the beginning of the November term, plaintiff filed his declaration in assumpsit and a summons issued on that day returnable to said November term. The summons was served upon defendant October 26th. The declaration made claim for a balance alleged to be due for rent of certain premises, and, in conformity with section 55 of the Practice act, plaintiff filed with his declaration a copy of the account sued on and an affidavit to the effect that after the allowance of credits, etc., the sum of \$1,255.84 was due.

On November 21st defendant, by her attorney, entered her appearance but filed neither plea nor affidavit of merits. The court on motion of plaintiff defaulted defendant and entered judgment against her for the amount stated in the affidavit. On January 10, 1929, defendant notified plaintiff's attorney, and pursuant to such notice on January 11th moved to set the judgment aside. On January 26th thereafter the motion was granted, and from that order this appeal has been perfected.

It is contended by the plaintiff that the court was wholly without jurisdiction to set aside the judgment entered at a

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prior term after the expiration of the term.

The motion of defendant was supported by her affidavit, which averred a meritorious defense and that she had paid the defendant all the money she owed him, and by the affidavit of her attorney who stated that no notice of the taking of the default was given to him and that judgment was entered contrary to rule 30 of the Circuit court, which he avers says:

"That notice must be served upon either the defendant or his counsel personally if an appearance is on file wherein default is entered for the want of pleading."

The affidavit not only denies that notice was given but avers that the defendant was without knowledge that the default was about to be taken.

There is no doubt of the general rule that, after the expiration of the term of court at which a judgment is taken, the court cannot set the judgment aside because of any alleged error of law and can only amend it as to matters of form after notice to the opposite party. Cramer v. Commercial Men's Assoc., 260 Ill. 519, and cases there cited.

Errors of fact may be corrected, however, after the term pursuant to motion in the nature of a writ of error coram nobis, as outlined in section 89 of the Practice act. The plaintiff says that a motion under section 89 must be made in writing; that the record fails to disclose such motion, and that the motion was therefore insufficient to confer jurisdiction on the court, citing Harris v. Chicago House Wrecking Co., 226 Ill. App. 220. Plaintiff has, however, failed to call our attention to the fact that this case was reversed by the Supreme court in Harris v. Chicago House Wrecking Co., 314 Ill. 500. The question was not raised either by demurrer or motion in the trial court, and we think it cannot be successfully urged here.

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The defendant relies on the recent case of Hiesdorf v. Fyfe, 250 Ill. App. 122. That was a case in tort where the court proceeded to enter judgment by default and assess damages without notice although defendant's appearance was on file. The third division of this court held, upon the authority of Cairo & St. L. R. R. Co. v. Holbrook, 72 Ill. 419; Kalamazoo Mfg. Co. v. Thomas, 17 Ill. App. 235; American Mail Order Co. v. Marsh, 118 Ill. App. 248, and Straus v. Biesen, 242 Ill. App. 370, that this constituted an error of fact such as could be corrected by the mode prescribed in section 89 of the Practice act. All these cases, we think, are distinguishable by the fact that section 55 of the Practice act was not, as here, applicable.

The plaintiff contends that Cramer v. Commercial Men's Assoc., supra, where section 55 of the Practice act, as well as rule 20 of the Circuit court, were construed, is controlling on the questions raised here. He also cites Precision Products Co. v. Cady, 233 Ill. App. 77, followed in McBulley v. White, 248 Ill. App. 372. This case is, however, distinguishable from the Cramer and the other cases cited, in that the rule of court which we are called upon to construe does not appear to be the same in substance, although it is the same in number.

The plaintiff says that the rule is not accurately set forth in the affidavit of defendant's attorney and asks us to look at Sullivan's law directory to determine what the rule actually is. The directory, however, is not a part of the record. We cannot take judicial notice of its contents or of the rules of court. If the rule as set forth in the record is not accurate, the matter should have been presented to the trial court and the true rule made to appear as a part of the record. Assuming (as we must) the rule to be as stated in the record, we think it must be held that the trial court, which is presumed to know its own rules, would not have

entered the judgment if it had been aware that defendant's appearance was on file. This was an error of fact which, if the court had known, would have prevented the entry of the judgment and therefore was properly corrected by action under section 89.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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 government has been unable to secure
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 This has led to a situation where the
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 This is a serious situation and one
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The second of these is the fact that the
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 policy of non-interference in the
 internal affairs of the country.

33291

HENRY H. SMITH,
Appellee,

vs.

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY, a
Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COCK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against defendant to recover \$5356.61 which he claimed was due him on account of insurance he had obtained for the defendant. There was a verdict and judgment in his favor for \$4,000 and the defendant appeals.

The record discloses that in February, 1921, plaintiff was employed by Joseph H. Strong, general agent of the defendant company, as bookkeeper and cashier, the office being in charge of Strong. Plaintiff was also required to perform other duties, such as collecting premiums, etc. He was paid a salary of \$2100 a year plus 10 per cent bonus, making a total of \$2310, which was payable in monthly instalments. Plaintiff began his work in February, 1921, and continued until about the first of December, 1923, when he left Strong's office and went to work for another agent of the defendant company. He continued to work for the defendant until about July, 1925. While he was working under Strong he was paid his salary and bonus until about the middle of 1923 when his salary was increased and thereafter he was paid the increased salary without any bonus.

Plaintiff's position was and is that in addition to the payments made to him he was to receive a part of the commissions on any insurance he might obtain for the defendant company, either in Strong's office or outside of Strong's office, and that he wrote

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insurance for the defendant and it is to recover these commissions that he sues.

On the other side the defendant's position was and is that plaintiff's services were to be paid for in salary and bonus and that he was entitled to no commissions. Evidence was offered on behalf of each party tending to sustain their respective contentions. As stated, the jury found the issues for the plaintiff and assessed his damages at \$4,000.

The defendant contends that there is a fatal variance between the allegations of the declaration and the proof. The declaration consists of a special count and the common counts, and whether there was a variance between the special count and the proof is immaterial, because if plaintiff was to receive commissions on insurance he obtained (and the evidence tended to show that he had obtained such insurance and the premiums had been received by defendant but plaintiff's commissions had not been paid to him), an action of assumpsit would lie and there would be no variance between the proof and the common counts, as under such counts a recovery may be had where the defendant has money which in equity and good conscience he ought not to retain. And since the evidence tended to sustain plaintiff's contention, there was no variance. The contention of the defendant cannot be sustained.

Defendant further contends that the verdict and judgment are against the manifest weight of the evidence. If, upon a consideration of all the evidence in the record, we are of the opinion that the contention is sustained, it is our duty to reverse the judgment. Donelson v. East St. Louis Ry. Co., 235 Ill. 625. The question then is: Is the verdict and judgment against the manifest weight of the evidence? We think it is.

Plaintiff testified in his own behalf that when he was employed by defendant through its agent Strong, he was told

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he would be paid a salary and a bonus and in addition he would be given a percentage of the premiums on any insurance he might be able to write; that he wrote insurance in obtaining 35 or 40 policies; that he demanded his percentage of the commissions from defendant's agent Strong; that the latter put him off, saying, "I will pay these commissions when I get around to it." Plaintiff further testified that he spoke to Strong about the payment of these commissions forty or fifty times, nearly every week, and received similar responses on each occasion. The agent, Strong, called on behalf of the defendant testified that there was nothing said about commissions at the time plaintiff was employed or at any other time until about the time plaintiff sued, which was long after he left defendant's employ; that plaintiff was to receive a salary and bonus and his duties were to keep the books, act as cashier, meet the people when they came in to transact business, and other duties; that the witness sent plaintiff out on errands from time to time and on business matters of the defendant company.

Plaintiff further testified that he wrote a letter to the defendant company demanding his commissions, but he does not state whether he received any reply or not, nor does he state whether he kept a copy of the letter.

The undisputed evidence is that reports of commissions were made weekly or monthly to the home office of the defendant company in Boston, Massachusetts, and that all of the commissions were paid out as they were received, part going to the company, part to Strong and other agents who had contracts with Strong concerning the writing of insurance for the defendant company. The books of the company, which were kept by plaintiff for a considerable time, and afterwards were kept by another employe of the defendant under plaintiff's supervision, showed that all of the commissions had been paid out, the reports and payments being made

as often as once a week. Plaintiff testified that he spoke to other representatives of defendant about the commissions he claimed were due him. Some of these persons were called and testified on behalf of the defendant that although they came in contact often with plaintiff, he never made any mention of the fact that commissions were due him from defendant for the writing of insurances.

The record further discloses that plaintiff made an application for a bond he was required to give to the defendant company and to Strong, and in response to questions there asked, stated the salary he was receiving and his answers there indicated he was not in the receipt of any other income. There is other evidence of a documentary character in the record that tends to show that plaintiff was not claiming any commissions until after he left defendant's employ; but there is nothing in the record upon which plaintiff bases his claim except his own testimony.

We think that if plaintiff had made the demand upon the defendant Insurance company by writing them a letter, as he testified he did, he would have some written evidence of this fact, but none is produced and the evidence of defendant is to the effect that they never heard of plaintiff's claim until shortly before the suit was brought in April, 1926, some time after he had left the employment of defendant.

Upon a careful consideration of all the evidence in the record, we are of the opinion that the verdict of the jury is against the manifest weight of the evidence.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

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WILLIAM TAYLOR,
Appellee,

vs.

MARY E. TOTBILL,
Appellant.APPEAL FROM SUPERIOR COURT
OF CHICAGO COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against William E. Totbill, Mary I. Totbill and Mary E. Totbill to recover damages for personal injuries and there was a verdict in favor of plaintiff and against defendants for \$4500. On motion for a new trial the death of the defendant Mary I. Totbill was suggested of record and the suit was abated as to her. Judgment was entered on the verdict against the two remaining defendants and Mary E. Totbill alone prosecutes this appeal. She will be hereinafter referred to as the defendant.

The record discloses that on April 26, 1927, plaintiff was employed by the City of Chicago in collecting and removing ashes and dirt; he had been in the employ of the city for about nine years. On the day in question he was working in the alley in the rear of 230 West Chicago Avenue, where a woman on the back porch of the third floor of a building at that number called him to come up and remove some ashes from the flat; this he proceeded to do, and when in the act of putting a box of ashes on his shoulder on the back porch of the third floor he came in contact with the railing extending around the porch; it gave way and he fell to the ground and was severely injured.

The evidence offered in behalf of the plaintiff tends to show, in addition to the foregoing, which is undisputed, that the railing was rotten and in a bad state of repair; while the defendant offered evidence tending to show that a short time prior to the accident new stairs had been put in leading to the porches

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at the rear of the building, which consisted of a store on the first floor and two flats above; but there is no evidence tending to show that the railing around the back porch on the third floor had been recently repaired. It is clear that the evidence shows the railing was old and decayed and there was other evidence tending to show that the defendant knew of this fact for a considerable time prior to the day of the accident. Indeed, there is no substantial dispute in the evidence as to how the accident happened nor the extent of plaintiff's injuries. The only defense interposed was that the defendant was not at the building on the day in question, but on the contrary, two other women were cleaning the flat or removing some old furniture that had been left by a former tenant, and that one of these women, without any authority from the defendant, called the ash man.

A number of witnesses gave testimony tending to show that the defendant was home on the day of the accident on account of illness, and was not at the building. Two women gave testimony to the effect that they were at the flat at the time plaintiff was injured; that the defendant was not there; that they had been authorized by the defendant to remove some old furniture from the flat left there by a tenant who had recently been dispossessed by court action, and that one of them called the plaintiff to remove the ashes. On the other side, witnesses for the plaintiff testified that the defendant herself was at the premises on the day in question, and there is evidence indicating that she was the one who called the ash man. We have carefully considered the evidence in the record and are of the opinion that we would not be warranted in holding that the verdict in favor of the plaintiff was against the manifest weight of the evidence, as defendant contends. We think the question in controversy was for the jury.

Counsel for defendant, in his statement of the case, mentions the fact that the evidence shows that plaintiff had received compensation under the Workmen's Compensation Act from the City of Chicago, amounting to \$2900, and in his brief of points and authorities, the point is made, as we understand it, that the court should have directed a verdict in favor of the defendant at her request because of the compensation plaintiff had received from the City. However, when we come to the argument following the brief, the point is not adverted to and, under Rule 19, is waived. But in any event there is no merit in the point. Gones v. Fisher, 283 Ill. 606.

A further point is made in the statement of the case in counsel's brief as follows: "The court gave a number of instructions at the request of the plaintiff and three submitted for the defendants. The instructions are contradictory as to the duties or liabilities of an owner, to either a licensee, or invitee, or trespasser, or party dealing with an independent contractor of an owner. The jury did not follow the instructions as to the law or weight of the evidence." Again we find no mention of this in the argument. It is nowhere pointed out what the instructions were nor what complaint, if any, counsel makes as to them or either of them. There is some argument to the effect that plaintiff was, at most, a mere licensee and therefore defendant owed no duty except not to wantonly injure him. We think the evidence was sufficient, if the jury believed it, to show that plaintiff was an invitee, in which event the defendant would be liable for any negligence as a result of which plaintiff was injured, provided he was in the exercise of due care for his own safety.

Since there was evidence tending to show that plaintiff was invited by the defendant to come up on the back porch to remove ashes, and since there is no dispute that he was injured through the

negligence of the owner of the building in failing to have a safe railing around the back porch on the third floor, and since there is no dispute as to the nature of plaintiff's injuries, no complaint being made as to the amount of the verdict, and since there are no objections pointed out to any of the instructions, the judgment of the Superior court of Cook county must be affirmed.

Affirmed.

McSurely, J. J., and Hatcher, J., concur.

ANDREW J. THOMA, a minor, by
CHARLES J. THOMA, his father,
and next friend,

Plaintiff in error,

vs.

N. J. DRUECKER COMPANY, a corporation,
et al.,

Defendants in error.

FROM THE SUPREME COURT

OF THE STATE OF NEW YORK.

MR. JUSTICE CROMBIE delivered the opinion of the court.

Andrew J. Thoma, a minor, by his father, brought suit against N. J. Druecker Company, a corporation, and Elaf Ruff, to recover damages for personal injuries sustained by being run over by a wagon belonging to the N. J. Druecker Company and driven by its servant, Ruff. At the close of his case plaintiff dismissed the suit as to the driver of the wagon. The defendant then put in its evidence, the jury was instructed, and upon consideration returned its verdict in favor of the defendant, and plaintiff appeals.

The record discloses that about 8:30 on the morning of September 16, 1925, plaintiff, a boy about 17 years of age, was riding east in Wellington street on his bicycle, on his way to school, and as he attempted to pass between a car and a horse-drawn wagon belonging to the defendant Druecker Company being driven east on Wellington street, and two automobiles standing at the curb of Wellington street, he collided with the horse and was thrown from his bicycle, and the front hind wheel of the wagon ran over his leg injuring it so severely as to require amputation.

A number of witnesses were called by plaintiff and defendant, who gave testimony to the effect that the facts of the accident were brief and clear, that the street was in good condition; that defendant's wagon drawn by two horses was loaded with 100 bags of cement weighing 94 pounds each; that the wagon

was being driven east in Wellington street at or near the center of the roadway of the street, said was about 30 feet wide; that the team was traveling at an ordinary walk; that as the team and wagon proceeded they gradually drew towards the south curb; that there were two automobiles parked at the south curb; that plaintiff and another boy about his age were riding their bicycles to school, traveling east some distance behind the wagon; that as the team and wagon were passing, the first or west parked automobile the team suddenly turned to the south, closing the space of 5 or 6 feet between the wagon and the automobile, causing a collision between the bicycle and the wagon; that plaintiff's companion caught hold of the parked automobile and was uninjured, but plaintiff was thrown or fell off his bicycle and the rear right wheel of the wagon passed over his leg. There was testimony that there was no other traffic in the street at the time; that the boys had been riding for about a block behind the wagon before they overtook it and that they saw it all the time; that they were traveling about 10 miles an hour; that they gave no signal, such as ringing the bell, or otherwise, that they were about to pass between the wagon and the parked automobiles. The evidence further shows that the driver was not aware of the position of the boys until the boy had been thrown to the ground, and thereafter, that when the driver heard the plaintiff scream as the wagon struck him, he brought his team to a stop in from 10 to 15 feet. The driver of the wagon, called by the defendant, testified that the team did not turn suddenly to the right but went on in a straight direction; that the space between the parked automobile and the track was only about two feet. There is no evidence that the driver halted the team to the south or that the horses became frightened.

The foregoing is the evidence as to how the accident occurred, and it will be noted that substantially the only dispute is whether the team turned suddenly in front of the boys in the

space between the parked automobile and the wagon.

Plaintiff contends that the verdict is contrary to the evidence in that the evidence shows the boys were caught in the pocket between the automobiles and the wagon by reason of the team turning suddenly to the right. We think this was a question of fact for the jury, and upon a careful consideration of all the evidence in the record we are clearly of the opinion that we would not be warranted in disturbing the verdict of the jury on the ground that it is against the manifest weight of the evidence. Common knowledge teaches us that a team walking at an ordinary gait hauling a load such as the one in question, could not be turned as suddenly to the right or south as the testimony of the witnesses for the plaintiff indicates, and especially is this true when there is no evidence that the horses became frightened or that the driver did anything to cause the team to turn suddenly.

Plaintiff further contends that the court erred in instructing the jury, at the request of the defendant, that plaintiff could not recover unless he was in the exercise of ordinary care for his own safety, because there was a wilful and wanton count in the declaration, that the evidence tended to support such a count and therefore, under the law, plaintiff could recover although he was not in the exercise of due care for his own safety. A number of cases are cited to this proposition, and the defendant cites cases and argues that the count was not a good count and that there was no evidence of wilfulness or wantonness. We think plaintiff is in no position to urge this point because the court, at his request, instructed the jury that plaintiff could not recover unless the jury found from the evidence that at and immediately prior to the time of the accident he was in the exercise of ordinary care for his own safety. The instructions, in effect, eliminated the wilful and wanton count, even if it was a good count, which we do not

decide. The record also discloses that the court was of the opinion that there was no evidence to sustain such a count and intimated that he would instruct the count out if such an instruction were offered. Plaintiff refused to dismiss the count and defendant apparently neglected to draw such an instruction. But, as stated, it was eliminated by the instructions given at the request of both parties. Moreover, we are of the opinion that there was no evidence that would warrant a verdict under such a count. There was no such conduct on the part of the driver of the team as would amount to a wanton or willful disregard for the welfare of the boys, which is a necessary element under the law to sustain a wanton count.

Complaint is also made that the court erred in giving instruction No. 2 requested by the defendant. That instruction specified three propositions that the plaintiff must prove by a preponderance of the evidence to entitle him to recover. The second was "That the defendant was guilty of the negligence charged by the plaintiff;" and the complaint is that it did not limit the charge of negligence mentioned in the declaration. We think there was no such defect in the instruction as would warrant us in holding it to be reversibly erroneous. The facts are simple and easily understood. All of plaintiff's evidence and his theory was that the team suddenly turned to the south. This was substantially the only point in the case. We think the instruction did not in any way mislead the jury or prejudicially affect the plaintiff. Further complaint is made of this instruction on the ground that it told the jury that before plaintiff could recover he must prove by a preponderance of the evidence that he was in the exercise of ordinary care and caution for his own safety "commensurate with his age, intelligence, understanding and experience," the objection being that it did not include the word "capacity," although this element was included in other instructions. We think the objection is hypercritical. In

passing on a similar instruction where the same objection was made, we said: "We think the word 'intelligence' as used in the instruction includes the element of capacity. Illinois Central R.R.Co. v. Slater, 129 Ill. 91; City of Chicago v. Keefe, 114 Ill. 222. In Funk and Wagnall's New Standard Dictionary of the English language one of the definitions given of the word 'intelligence' is 'capacity to know or understand.'" Burns v. City of Chicago, 248 Ill. App. 204. The objection is without merit.

Plaintiff also complains of what he designates instruction No. 5, given at defendant's request. By it the jury was told that not every accident made the owner of a team and wagon liable for damages; that "if an accident is unavoidable then no liability is incurred whether as a result a person is seriously or slightly injured. And if you believe from the evidence in this case that this accident was unavoidable and occurred without negligence on the part of the defendant," then the plaintiff could not recover. In support of this contention plaintiff argues that an action may be unavoidable and yet the defendant be held liable because it may have resulted from the gross negligence of the defendant. As an example counsel say: "A person going fifty miles an hour in an automobile might not be able to avoid an accident which would be avoidable if he had been going slowly. But we think such an illustration is inapt here. There is no evidence or claim that the defendant was negligent in driving the team except that it was suddenly turned to the south. If there was any other negligence there was no causal relation between it and the accident. Moreover, we think the instruction is not subject to the objection made, because it tells the jury that if they believe from the evidence that the accident occurred without negligence on the part of the defendant, plaintiff cannot recover. A somewhat similar objection is made to another instruction given at the defendant's

request, which was in substance that the servant in charge of the team was not required to exercise the highest degree of care to avoid injuring plaintiff, but was required to exercise only ordinary care, and that if the jury believed from the evidence that prior to and at the time of the accident the team was being driven with ordinary care and the driver, in the exercise of ordinary care, did all he could to avoid the accident as soon as it was ascertainable by the exercise of ordinary care, then the plaintiff could not recover. What we have said in reference to instruction No. 5 is applicable here. This case is not like the case of Paulsen v. McAvoy Brewing Co., 226 Ill. App. 605, cited by counsel for plaintiff. In that case there was evidence of the negligent driving of the team for some considerable time before the accident occurred. And it was held that it was not sufficient for the driver of the team to exercise ordinary care after he became aware of the impending danger, as was also the fact in Novitsky v. Knickerbocker Ice Co., 276 Ill. 102. As stated, there was no evidence of the negligent driving of the team in question except that it suddenly turned to the south.

It is also contended that instruction No. 10 given at defendant's request was erroneous. It told the jury that the "law of the State of Illinois does not regulate the precise rate of speed at which a team and wagon shall be driven *** under any given circumstances; nor does the law *** regulate the exact portion of the highway upon which a team and wagon shall be driven under any and all circumstances;" that the law requires the driver of the team to exercise only ordinary care to avoid injuries to persons lawfully upon the streets. The argument in support of the contention is that "The instruction does not refer to statute law but simply to law.*** but the law says also that persons upon the street shall not drive upon the wrong side of the street;" and that whether a team is being driven on the wrong side of the street may determine

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whether the driver is in the exercise of ordinary care. Further argument is made which we think clearly inapt. As stated, there is no evidence that there was any negligence of the driving of the team which had any causal relation to the injury except the alleged sudden turning of the horses to the south. We think the instruction is not subject to the objection made.

A further complaint is made to instruction no. 13 by which the jury was told that if they believed from the evidence that any witness had wilfully and knowingly sworn falsely to any material fact in the case, then the jury had the right to disregard the entire testimony of such witness unless such testimony was corroborated by "other evidence which you believe to be credible or by facts and circumstances appearing in evidence." And it is contended that a similar instruction was held bad in C. & A. R. Co. v. Kelly, 210 Ill. 450. The instruction in that case was, we think, somewhat different. It told the jury to disregard the testimony of a witness who had wilfully sworn falsely "except in so far as it may have been corroborated by other credible evidence which they do believe, or by facts and circumstances proved on the trial." We think the instruction in the Kelly case is more emphatic, and while the instruction complained of here is not to be approved as being accurate, yet we think it is not so inaccurate as to warrant us in disturbing the judgment where, as here, the facts are simple and easily understood.

It is also contended that the court erred in giving an instruction advising the jury what they should consider in determining on which side there was a preponderance of the evidence, in that it failed to include the number of witnesses. We think the instruction is not subject to such construction. It told the jury that the number of witnesses testifying, on one side being larger than those on the other did not necessarily determine on which side

the preponderance of the evidence lay. It impliedly told them to consider the number in arriving at the question of the preponderance of the evidence. We have considered the other contentions made by the plaintiff but are of the opinion that they are not substantial.

Upon a careful consideration of the evidence we are clearly of the opinion that we would not be warranted in disturbing the verdict in this case. The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, F. J., and Ketchett, J., concur.

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Figure 1. The effect of the number of trials on the number of correct responses. The number of correct responses was significantly higher for the 10 trials condition than for the 5 trials condition. Error bars represent the standard error of the mean.

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Figure 1. The effect of the initial concentration of the monomer on the polymerization of α -methylstyrene initiated by BuLi in THF at -78°C . The polymerization was carried out in the presence of 1.0×10^{-2} mole/l. of BuLi in THF at -78°C . The polymerization was terminated by the addition of methanol. The polymerization was carried out in the presence of 1.0×10^{-2} mole/l. of BuLi in THF at -78°C . The polymerization was terminated by the addition of methanol. The polymerization was carried out in the presence of 1.0×10^{-2} mole/l. of BuLi in THF at -78°C . The polymerization was terminated by the addition of methanol.

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33296

W. G. HANLEY,

Appellee,

v.

THEODOR KLOPP and
BERTHA KLOPP,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 26, 1929

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The plaintiff, W. G. Handley, filed his statement of claim in the Municipal Court to recover from the defendants, Charles F. Jeske, Theodor and Bertha Klopp, certain moneys claimed to be due by reason of the sale of an automobile to the defendant Jeske, the payment for which was guaranteed by the defendants, Theodor and Bertha Klopp. At the time of the sale a note was executed by Jeske bearing the endorsement of Theodor and Bertha Klopp, which was made payable to F. H. Robinson Motor Sales and endorsed by F. H. Robinson Motor Sales to the plaintiff. The note was executed July 28, 1926. It provided for a payment of \$105.00 on that date and \$45.00 with interest on each and every month thereafter until the total amount of \$645.00 was paid, together with interest. The first payment was made at the time the note was executed. August 28, 1926, judgment was taken by confession on the note. The defendants appeared and filed their petition, asking to have said judgment vacated and set aside and leave granted them to appear and defend and in their petition charged that the principal defendant Jeske at the time of the sale was a minor and that he had rescinded the contract and returned the property to the plaintiff; further charged that the condition of the machine had been misrepresented to Jeske and that the sale of the automobile in question was brought about by fraud

Opinion filed June 28, 1934

on the part of the A. H. Robinson Motor Sales.

The prayer of the petition was granted and the cause tried before a jury, resulting in a directed verdict in favor of the plaintiff and against the defendants, Theodor and Bertha Klepp. The defendant Jeske was dismissed out of the suit on motion of the plaintiff prior to the entry of the judgment, it appearing from the evidence that Jeske at the time of the transaction in question was a minor.

We are of the opinion that the defendant Jeske was properly dismissed out of the suit as the note in question, authorizing the confession of judgment against him was a nullity. Fugua v. Sholem, 60 Ill. App. 140. A minor cannot execute a valid warrant to confess a judgment against himself. The note in question was secured by a chattel mortgage.

Jeske testified that the car would not run but a short distance and that he had to work a considerable time upon it in order to get it started; that at the time he bought the car, he was told it had been taken in, about three days before, on a trade and had been completely overhauled and was in perfect running condition. Jeske further testified that he informed the Robinson people of the condition of the car and was told that they had sold the note to Handley and that he thereupon called the plaintiff, Handley, and told him that if he wanted the car he could come and get it as he did not want it any longer and was told by the plaintiff that a man would be sent to get the car.

It is urged as a ground for reversal that the guarantors on the note were released because from the evidence it appeared that the principal Jeske had rescinded the contract of purchase on the ground that he was a minor and that, therefore,

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the liability of the defendants Theodor and Bertha Kloop failed because there was no liability on the part of the principal. Particularly as the plaintiff had consented to the rescission by receiving back the subject matter of the contract; viz. the automobile.

There is evidence in the record to sustain the position of the defendants to the effect that Jeske notified the plaintiff that he desired to cancel the agreement and return the property and that the property was taken by the plaintiff under this agreement and not under a foreclosure of his mortgage.

It may be argued that the note was a separate transaction and created an individual liability against the guarantors, but the cause was tried on the theory of a sale with the note as a collateral undertaking as security. If, as a matter of fact, Jeske rescinded the sale and returned the automobile, the principal obligation was at an end and the contract of guaranty fell with the release of the principal obligor. If the principal obligor, a minor, had received money or property in consideration of a note guaranteed by others and not returned, a somewhat different question might be involved. But, in the case at bar, the note was not the principal undertaking and, moreover, the property was returned.

The Supreme Court of Iowa in the case of Keokuk County State Bank v. Hall, 106 Ia. 540, in its opinion says:

"The general rule is that where a party becomes surety for an infant he is bound, though his principal is not. Jones v. Crosthwaite, 17 Iowa 393; Allen v. Berryhill, 37 Iowa 534; 1 Brandt Suretyship, section 153. But to this as to most other rules there are exceptions. When the principal disaffirms the contract, and returns the consideration received under it, the surety is thereby discharged. 1 Brandt Suretyship, section 153; Baker v. Kennett, 54 Mo. 82; Patterson v. Dove, 61 Mo. 439. In the first of these cases an infant purchased real estate, and gave his promissory note, with sureties

thereon, for the price. On reaching his majority, the infant disaffirmed the contract, and restored the real estate to the vendor. The court says: 'It would be a strange doctrine which would give him (the creditor) back his land, and permit him to recover from the sureties the purchase money also.' If Hill did in fact disaffirm the contract, and return the property received thereunder to Skinner Bros., it would be a complete defense for the surety, and we think the court erred in refusing to receive the offered evidence."

The Supreme Court of this State in the case of House v. Schnadig, 235 Ill. 361, held that the liability of a surety upon an appeal bond was discharged upon the principal subsequently obtaining a discharge in bankruptcy, which barred the action.

The Supreme Court of California in the case of Glassell v. Coleman, 94 Calif. 260, in its opinion says:

"Wilson's liability to the plaintiff upon his agreement to pay the purchase price for the land ceased with the plaintiff's rescission of his right to receive the land upon such payment. Whether his obligation for such purchase-money was expressed in the contract of sale, or in the promissory note executed contemporaneously therewith, is immaterial. Each instrument was executed as a part of the same transaction, and the forfeiture of his right to the land wrought an entire failure of the consideration for his promise to pay for the land, irrespective of the instrument in which the promise was contained. The writing, 'somewhat in the form of a promissory note,' which the contract provided should be executed by Wilson to the plaintiff was by the terms of the contract to be only an 'additional' evidence of the obligation to pay the second and third installments; and the installment note itself purports in terms to be given only 'as additional security for the payment' of those installments."

The question was considered by the Supreme Court of Missouri in the case of Baker v. Kennett, 54 Mo. Rep. 82. The Court in its opinion in that case said:

"As a general proposition it is undoubtedly correct, that infancy does not protect the indorsers or sureties of an infant, or those who have jointly entered into his voidable undertakings. But the cases in which this principle has been decided are clearly

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distinguishable from the present one. Here, the undertakings of the sureties goes to the whole consideration.

Story says, 'that a subsequent failure of consideration is equally fatal with an original want of consideration, and if a bill is given as an indemnity, it is a sufficient answer to it that the party has not been demitted at all, or that the original claim has been extinguished.' (Story Bills, § 184.)

By the disaffirmance of the contract the plaintiff gets back his land, and the consideration which upheld the contract is extinguished.

It would be a strange doctrine which would give him back his land, and allow him to recover from the sureties the purchase money also."

From the cases cited it would appear that the general rule is that where a minor rescinds a contract and returns property, real or personal, which was the subject matter of the agreement, in good conscience, guarantors for the minor should be released from their obligation. The reason for the rule appears to be sound in that it is inequitable to permit a person dealing with one under age to receive back the property and, at the same time, have an additional right over and against the guarantors. Under such circumstances, by the acceptance of the property and the rescission of the contract, the law would imply that the contract in its entirety was rescinded and canceled in as much as the parties were placed in statu quo.

We are of the opinion that the judgment of the trial court should be reversed on the issues submitted to the jury on the question as to whether or not there was a tender back of the property by Jeske and an acceptance by the plaintiff.

For the reasons stated in this opinion the judgment of the trial court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HOLDOM, AND RYNKE, JJ. CONCUR.

• *Journal of the American Medical Association*, 2000; 283: 2639-2644

33323

LOUIS FEINGLASS,

Appellant,

v.

MAURICE ALSCHULER and MAX SHORE,
CITY OF CHICAGO, a Municipal
Corporation, WILLIAM HALE THOMPSON,
Mayor of the City of Chicago,
ALBERT GOODRICH, Fire Commissioner
of the City of Chicago, JOHN PLANT,
Chief Fire Prevention Engineer of
the City of Chicago, and RICHARD WOLFE,
Commissioner of Public Works of the
City of Chicago,

Appellees.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

Opinion filed June 26, 1929

MR. PRESIDING JUSTICE WILSON delivered the
opinion of the court.

Complainant Louis Feinglass filed his bill of
complaint in the Circuit Court against Maurice Alschuler
and Max Shore, defendants, as owners of a piece of vacant
real estate located at 549-551 West Roosevelt Road, Chicago,
Illinois, charging that they were about to erect and maintain
a gasoline filling station upon said premises, contrary to
a certain ordinance of the City of Chicago, known as Section
2279 of the Municipal Code, and praying for an injunction to
restrain them from so doing. The Mayor of the City, to-
gether with the Fire Commissioner, Fire Prevention Engineer
and the Commissioner of Public Works were made parties de-
fendant to the bill. Answers were filed and the cause referred
to a Master in Chancery to take testimony and report his con-
clusions. The Master's report on the evidence was against the
plaintiff and in favor of the defendants, and upon hearing the

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

AND C. J. AT BYR 3148. 310

exceptions to the Master's Report, the Chancellor overruled the exceptions and dismissed the bill for want of equity. From this order complainant prayed his appeal to this court.

The ordinance in question provides:

" * * No such tank or tanks shall be installed in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theatre."

The tanks referred to being tanks used for the storage of gasoline, etc.

The bill charges that the premises of the defendants on which the proposed gasoline filling station was to be erected was within 200 feet of a school and, therefore, contrary to the ordinance. From the facts it appears that the school was an institution intended to give instructions in occupational therapy and to teach trades to disabled persons who were unable to follow their ordinary occupations; that among other things the institution consisted of departments where machine sewing, hand sewing, weaving, wood work, broom making, assembling, and shoe repairing were taught, and that no one under the age of 16 years was accepted. Each person seeking instruction in said institution was required to punch a time clock upon arrival and also upon leaving. Each of said students was paid for the work done by him while at the institution. There were no courses in reading, writing, arithmetic, history, geography or spelling or any of the courses ordinarily required in the curriculum of schools as ordinarily recognized as primary institutions of learning.

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We do not believe the institution comes within the meaning and classification of "school" as referred to in the section of the ordinance hereinbefore quoted. People v. Deutsche Gemeinde, 249 Ill. 132. From the testimony it appears that the institution was known as an Industrial Workshop and that no studies were pursued requiring only mental action.

By a supplemental bill filed in the cause complainant charged that certain of the frontage consents were not genuine. The Master found in his report that after the filing of the bill, additional frontage consents were supplied so that there was a surplus of 230 feet over the requirements of the ordinance. Such being the fact, as found by the Master and the Chancellor, we see no good reason for requiring the defendants to again proceed to acquire an order from the City authorities and be subjected to further litigation. The City of Chicago did not raise any objection to the permit on this or any other ground, and the defendants had a right to rely upon the issuance of the permit based upon the signatures submitted to the City for its inspection. The City is not asking to have its action in granting the permit reviewed.

For the reasons stated in this opinion the decree of the Circuit Court dismissing the bill for want of equity, is affirmed.

DECREE AFFIRMED.

RYNER AND FOLSOM, JJ. CONCUR.

33332

CECILIA KENDZIORA,

v.

MORRIS ALBIN,

Appellee,

Appellant.)

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed June 26, 1929

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The plaintiff Cecilia Kendziora took judgment by confession against Morris Albin, defendant, for the sum of \$375, same being for rent for the premises known as 1656 West Chicago avenue, Chicago, Illinois, consisting of a store and basement, and also for attorney's fees. An execution issued upon said judgment on the 15th day of October, 1928 and defendant appeared and filed an affidavit in support of a motion to vacate the judgment and for leave to plead. The affidavit filed in support of said motion admits the execution of the lease to the premises in question and charges that there was a certain other store located at 1658 West Chicago avenue and upon the same premises as were those leased by the defendant and also operating under a lease from the plaintiff. The affidavit further charges that the name of the adjacent tenant was the Chicago Knitting Mills and that at the time he entered into his lease he was informed that he could not carry a line of knit wear, nor would the adjacent tenant, Chicago Knitting Mills, be allowed to carry any ladies' dresses, cloaks or suits. The affidavit

further charges that the defendant was at that time and subsequently engaged in the sale of ladies' dresses, cloaks and suits and was informed by the plaintiff that if the adjacent tenant undertook to deal in and sell such apparel, it would be stopped by the plaintiff. The affidavit further charges that the defendant relied upon the representations and signed the lease in question. Charges further that he afterwards discovered that there was a line drawn through the words "Knit Wear Only" in the lease from the plaintiff to the Chicago Knitting Mills, and the words "Ladies' Ready-to-Wear and Children's Wear" inserted in said lease. Charges further that these changes were made after defendant had executed the lease to the premises occupied by him.

On a hearing before the court the defendant's motion to be allowed to plead, was overruled and an appeal prayed and allowed to this court.

The language of the lease in question is clear and unambiguous and contains no provision nor covenant protecting the lessee from the acts of other tenants engaging in the same lines of business. Such a protective covenant or condition could easily have been written into the lease and would have been binding upon the landlord. The rule governing the admissibility of parol evidence, to explain written instruments, applies where an ambiguity exists in the instrument itself which requires interpretation by oral testimony. No such thing appears to be present in the instant case. Armstrong Paint Works v. Can Co., 301 Ill. 102. Neither are we able to say that there is any legal obligation on the plaintiff which would prevent her from enlarging the rights of another tenant in regard to the sale of merchandise under such other tenant's lease.

There was an actual occupancy of the premises under the lease in question by the defendant and there does not appear to be any such construction or actual conviction as would release the tenant from the payment of rent for the period of time of occupancy covered by the confession in this case.

For the reasons stated we are of the opinion that the judgment of the Circuit Court was correct and the judgment is affirmed.

JUDGMENT AFFIRMED.

RYNER AND BLOOM, JJ. CONCUR.

33224

PETER E. MURPHY and MARGARET A. MURPHY, for the use of William W. Murphy,

Appellees,

v.

MARQUETTE PARK STATE BANK, a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 26, 1929

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an appeal by the Marquette Park State Bank, as garnishee, from a judgment for \$84.15 in favor of the judgment creditor of the plaintiffs and garnishers in the Municipal Court.

The cause went to a hearing upon the amended answer of the garnishee filed by leave of court, which answer is in the following words:

"The answer of the Marquette Park State Bank, a corporation, summoned as Garnishee herein, respectfully shows that at the time of the service of the writ herein, or at any time since then, it did not have any lands, tenements, goods, chattels, moneys, choses in action, credits and effects of the said Peter E. Murphy and Margaret A. Murphy in its possession, custody or charge, or from them due and owing at the time of the service of said writ, or at any time since then, or to become due at any future time.

MARQUETTE PARK STATE BANK, a corporation,

By Leonard G. Reid."

The answer was verified by the agent of the garnishee, who swore that the amended answer was true.

On motion of plaintiffs the answer of the garnishee was stricken from the files and without further ado, or the hearing of any testimony, the court entered a judgment against

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garnishee for \$84.15, from which the garnishee brings the record to this court for review.

Plaintiffs have not followed this appeal.

The reason assigned by the trial court for his action was that the amended answer set forth conclusions of law. We do not so view the answer. The answer fulfilled every requirement of the statute. The verified answer denied that at the time of the service of the writ the garnishee had any lands, tenements, goods, chattels, moneys, choses in action, credits and effects of Peter A. Murphy and Margaret A. Murphy in its possession, custody or control, or from them due and owing at the time of the service of the writ, or at any time since then, or to become due at any future time. On this answer the garnishee was entitled to be discharged, and the court erred in not so ordering on the authority of Jarecki Mfg. Co. v. Bailey, 163 Ill. App. 393, where it was held that if the answer of the garnishee denies property in its hands, it is entitled to a discharge, unless such answer is overcome by proof. As there is no proof of any kind de hors the answer, the court erred in striking the amended answer, and in rendering judgment, and in not discharging the garnishee upon its amended answer.

Therefore the judgment of the Municipal Court is reversed and judgment is entered in this court discharging the Marquette Park State Bank, as garnishee, with costs against plaintiffs here and in the Municipal Court.

REVEREND IN JUDGMENT HERE
FOR GARNISHEE.

WILSON, P.J. AND KYNEN, J. CONCUR.

DATE OF BIRTH: 08-19-1976

6. *Chlorophyll a* and *Chlorophyll b* (mg/g dry weight) were determined by the method of Lichtenthaler (1987).

1. *Phragmites australis* (Cav.) Trin. ex Steud.

1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

1. The first group of students (Group A) was assigned to read the text and identify the main idea of the passage. They were also asked to underline the key words and phrases.

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42. 2000年1月1日, 甲企业向乙企业借入期限为3年, 年利率为6%的长期借款100000元, 到期一次还本付息。甲企业于2002年12月31日计提利息时, 应借记“长期借款”科目, 贷记“应付利息”科目, 金额为()元。

[illegible]

33260

ALEX MORY,

Plaintiff in Error,

v.

PETER NICKIAS, et al.,

Defendants in Error.

WRIT OF ERROR TO

CIRCUIT COURT,

CHOC COUNTY.

Opinion filed June 26, 1929

MR. JUSTICE HOLLOM delivered the opinion of the court.

This is an action of replevin of certain personal property, in which on issues joined there was a trial before court and jury, in which the verdict of the jury was as follows:

"We the jury find the issues for the defendants and that the right of possession of property in question is in the defendant, John Vrettes."

Plaintiff made motions for a new trial, in arrest of judgment and for a judgment in his favor non obstante verdicto. All of these motions were overruled and a judgment on the verdict rendered in favor of defendants with an award of a writ of retorno habendo, from which judgment plaintiff brings the record to this court by writ of error.

We refrain from discussing the merits of the cause because in the condition of the record, naught is presented for our review.

It is argued for reversal that the evidence is insufficient to support the verdict. This we cannot determine because the bill of exceptions is defective in not certifying that it contains all the evidence offered at the trial. When the parties rested their case the bill of exceptions does not state that the evidence in it was all the evidence offered or

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Opinion filed June 28, 1931

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heard upon the trial, and the certificate of the trial judge also fails to certify that the evidence was all the evidence heard upon the trial. The language of the certificate of the trial judge is that:

"And, inasmuch as the matters above set forth do not fully appear of record in this cause, the plaintiff, tenders this Bill of Exceptions and prays that the same may be certified under the hand and seal of the Judge of this Court, and thereby made a part of the record in such cause, and it is certified accordingly this 20 day of November, A. D. 1928, nunc pro tunc as of October 29th, 1928."

We find nothing in the bill of exceptions which certifies that the evidence appearing therein is all of the evidence heard upon the trial. While it is true that the bill of exceptions was "O. K'ed" by defendant's counsel, there was nothing in that which indicated that the evidence in the bill of exceptions was all the evidence heard upon the trial of the case. As said in First National Bank v. Baker, 161 Ill.

381:

"The fact that the solicitors for appellee endorsed the certificate 'O.K.' over their signatures, is insisted upon as ground for the claim that the certificate must be considered as containing all the evidence. This, however, does not follow. The endorsement was an acknowledgment of the correctness of the certificate for what it purported to be, but the approval of the certificate could not be extended beyond what appeared in it."

These observations are equally applicable to the instant case. In Weingarden v. Weinberg, 303 Ill. App. 228, it was held that a document purporting to be a certificate of evidence was insufficient to constitute a certificate of evidence where it was not stated any where in it or in the certificate of the trial judge thereto that it contains all the evidence in the case. That is the condition in the bill of exceptions in the instant case;

In Steffey v. Sandifer, 302 *ibid.* 604, it was held

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the problem and the objectives of the research.

2. The second part of the report is a detailed description of the methods used in the study. It includes a discussion of the experimental design, the data collection procedures, and the statistical analysis techniques.

3. The third part of the report is a presentation of the results of the study. It includes a discussion of the findings, a comparison of the results with previous research, and a conclusion about the significance of the study.

4. The fourth part of the report is a discussion of the implications of the study. It includes a discussion of the limitations of the study, the strengths of the findings, and the potential for future research.

5. The fifth part of the report is a summary of the main findings of the study. It includes a brief overview of the research objectives, the methods used, the results, and the conclusions.

that a bill of exceptions which fails to state that it contains all of the evidence in the case, and the certificate of the trial judge thereto containing no statement with reference to the matter, is insufficient to permit a review of the facts, and the same is not cured by statements of counsel appearing in different portions of the bill of exceptions, or by the certificate of the official court reporter included in the record after the certificate of the trial judge, as such certificate is no part of the bill of exceptions, and there being no sufficient bill of exceptions in the record, it must be assumed that the verdict of the jury is correct upon the facts.

In the condition in which we find the bill of exceptions before us, we will assume that there was evidence sufficient to sustain the verdict of the jury upon the facts. The common law record is free from reversible error.

For the foregoing reasons the judgment of the Circuit Court is affirmed.

AFFIRMED.

WILSON, P.J. AND RYNER, J. CONCUR.

ANALYSIS OF THE DATA

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33302

MAYME HILDERBRANDT,
formerly Mayme Saurin,

Appellee,

v.

CITY OF CHICAGO,
a Municipal Corporation,
Appellant.

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

Opinion filed June 26, 1929

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action for personal injuries, suffered by plaintiff on April 26, 1926, while she was walking west upon the cement sidewalk in front of 3447 West Harrison street, Chicago. In an attempt to pass over two ruts in the sidewalk she suffered a severe sprain to her left foot and ankle.

The declaration was encompassed in two original and two additional counts. The defendant met the declaration as thus constituted by a plea of not guilty. As no questions arise upon the pleadings we will not further set them out.

A trial before court and jury resulted in a verdict in favor of plaintiff with an assessment of damages of \$3300, on which, after overruling motions for a new trial and in arrest of judgment, the court entered judgment, and defendant brings the record here for our review by appeal.

It is assigned for error and argued for reversal:

1. The court erred in admitting in evidence over the defendant's objection, Section 3562 of the ordinances of the City of Chicago:

2. The court erred in overruling the defendant's motion, made at the close of all the evidence, to find the defendant not guilty:

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Journal of Management Education 30(6)

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Journal of Management Education 30(6)p. 789-804

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

（一）“三三制”：在抗日根据地政权建设上实行“三三制”，即共产党员、进步分子、中间分子各占三分之一。

3. The court erred in giving to the jury, at the request of plaintiff her instructions numbered 4 and 6;

4. The damages awarded to plaintiff are excessive and manifestly out of proportion to the injury alleged to have been suffered.

The evidence tends to prove that at the time of the happening of the accident, as above set forth, the sidewalk over which she attempted to pass was broken through in front of 3447 West Harrison Street; that that particular part of the walk had been used for three years as part of a driveway into a garage there situated; that the curb had been broken out to permit vehicles to pass over this part of the sidewalk into and out of the garage; that there were two ruts in the walk, and when plaintiff reached the east rut she stepped over with her left foot on to what seemed to be a solid cement walk on the inside edge of the rut; that as she was about to step across said rut with her right foot her weight on the left foot caused the cement on which her foot rested to break, letting her foot down into the rut, where it became wedged, causing her to fall; that in attempting to get up she was not able to extricate her foot and she again fell; that a pedestrian helped pull her foot free of the rut; that the day after the accident an examination of the walk and rut disclosed that it was an ordinary cement sidewalk with a three inch foundation and a half inch hard surface, the foundation under the inside edge of the east rut in places being hollowed or washed out, leaving only the half inch hard surface extending over the edge of the rut; that as a result of her fall plaintiff sustained a sprain to her left foot and ankle; that on the night of the accident she sat up in bed because she was unable to sleep owing to pain; that the following day she became a patient at the Ravenswood Hospital, a plaster cast was placed on her left foot and there continued for about a month when it was removed; that the foot was then suspended by weights and kept

... ..

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

[illegible]

so for about two weeks thereafter, after which she was able to get up and sit in a wheel chair; that she was in the hospital about two months, and then taken to her home, and remained in bed for several months before she was able to walk around unattended; that she used a cane for a period of about a year and a half; that her left ankle was in such a weakened condition that her foot would at times turn, resulting in her falling; that she claimed that she last fell about a week before the trial of the cause, and that her foot became black and blue; and that she was out of pocket for hospital bill, doctor bills, loss of earnings, etc. in the neighborhood of \$2000.

The court did not err in admitting Section 3526 of the City Ordinances in evidence. It was admissible, if for no other reason, as notice to the city of the dangerous condition of the sidewalk. The ordinance provided that where driveways are built over sidewalk space, "they shall be nine inches in depth consisting of a layer of concrete seven inches in depth and a top or finishing layer two inches in depth." The city was charged with notice that the walk had been used as a driveway three years or more, and that contrary to the provision of the ordinance the sidewalk was constructed with only a three and one-half inch depth, which did not meet with the ordinance requirement, and from such fact the city was put upon notice as to whether in the condition of the sidewalk in not having been constructed in accordance with the ordinance, the walk was not rendered dangerous for public use. Counsel for plaintiff stated at the time he made the offer that the purpose was "to charge the city with notice of the dangerous condition caused at this particular place by reason of the fact that the sidewalk was not in the proportions as required by the ordinance." We are of the opinion that for such purpose it was properly admissible, and as said in

Bibbins v. City of Chicago, 193 Ill. 359, "we think the ordinances were proper evidence as bearing on the question of notice". To the same effect is City of Beardstown v. Clark, 204 *ibid.* In Hearn v. City of Chicago, 20 Ill. App. 349, the court said:

"We are of the opinion that said ordinances were material, and that their exclusion was error. They tended to show that the city had taken under its cognizance and control the sidewalks within its limits, and especially the entire supervision of the construction of the covers of all coal-holes or apertures in its sidewalks. " * " While it is true that a failure by a city to enforce its own ordinances will not, of itself, render it liable to a private person who may be injured thereby, still, the fact that the city, for the express purpose of preventing accidents, has assumed the control of the construction of covers to coal-holes and apertures in its sidewalks, and required them to be made of a certain structure and material, and committed the entire matter of their construction to the direction and supervision of a particular officer, might, when taken in connection with other facts, have an important bearing upon the question of the negligence of such officer in relation to the original construction, or to the subsequent inspection of the cover which caused the injury to the plaintiff."

And for the error in refusing to admit in evidence such ordinance the judgment in the Hearn case was reversed. City of Champaign v. Patterson, 50 Ill. 61, is likewise a supporting authority. In City of Rockford v. Hildebrand, 61 Ill. 155, the court said:

"They all tended to show that the sidewalks of the city were constructed under its authority, and that the city had taken them and its streets under its cognizance and control, and so far they were testimony relative to the issue."

Objection was made by defendant to the ordinance because it contained this phrase, "unless otherwise expressly authorized". It is argued that such phrase required proof on the part of plaintiff that no express authority was given to construct the driveway. This contention we regard as unreasonable. If such proof were essential, the burden rested upon defendant to make it, as such evidence would be of a negative character and the proof was in the possession of defendant and not the plaintiff. Great Western R. R. Co. v. Bacon, 30 Ill. 347; Williams v. People, 121 *ibid.* 84.

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the problem and the objectives of the research.

2. The second part of the report is a detailed description of the methods used in the study. It includes a discussion of the experimental design, the data collection procedures, and the statistical analysis techniques.

3. The third part of the report is a presentation of the results of the study. It includes a discussion of the findings, a comparison of the results with previous research, and a conclusion about the significance of the study.

4. The fourth part of the report is a discussion of the implications of the study. It includes a discussion of the limitations of the study, the strengths of the study, and the future directions of research.

The leading objection urged against the admission of the ordinance is that the ordinance provided for an exercise of police power. This argument is not apropos, as the ordinance had no relation to the exercise of police powers granted to the city in its corporate capacity, but applied to a local condition, viz., the construction and maintenance of the sidewalk in question. These objections being the only ones made to the introduction of the ordinance, other objections, if any there were, are waived. Kankakee Ry. Co. v. Chester, 63 Ill. 235; Sumption v. McWhorter, 115 Ill. App. 328.

The injury to plaintiff's foot and ankle was caused by the rut into which she stepped and fell, and not the breaking of the cement part of the walk contiguous to the rut.

It is next argued that the overruling by the court of defendant's motion, made at the close of all the evidence, to find the defendant not guilty was erroneous. In the condition of the record at the time the motion was made, the questions presented by the proof were ones of fact for the jury and not of law for the court. If the jury believed, as they evidently did, the proofs made by plaintiff, that would be sufficient on which to base a verdict for the plaintiff. The evidence in support of plaintiff's case found in the record was as against the proofs of defendant, sufficient to warrant the jury's verdict in favor of plaintiff. Furthermore, the ruts had existed for a sufficient length of time to charge the defendant city with notice that the sidewalk was by reason of such ruts made defective and unsafe for travel. The evidence showed that the rut was from three to four inches deep and from four inches to a foot wide, and extended across the sidewalk, and had been in that condition for about three years; that the hollow places under the inside of the rut

had been caused by water, ice and snow accumulating and standing in the ruts and that trucks passing over the ruts slushed the water against the sides of the rut, thereby gradually washing out the foundation leaving only the half inch of hard surface concealing the hollow spaces underneath. That was the condition which confronted plaintiff at the time of the accident, and what appeared to plaintiff to be a solid cement walk was but a shell extending over the hollow places, and was not sufficient to sustain her weight, so that when she was about to bring her right foot across the rut, her weight caused the half inch shell of the walk, where she had placed her foot, to break, letting her left foot down into the rut where it became wedged and fastened. While plaintiff knew that the ruts were there, she did not know that the foundation over the edge of the rut had been washed out. The defects in the walk which caused the injury to the plaintiff were not latent. The ruts were plainly visible. The defect in the sidewalk was the rut into which plaintiff's left foot slipped, that condition had existed for a period of three years or more. This is not denied by defendant. Such defect which had continued for such a long period of time was in law constructive notice to defendant, sufficient to require the city to correct such defect, which was a menace to the safety of pedestrians.

We have examined the instructions given to the jury regarding the law of the case, and we find therefrom that the jury were sufficiently properly instructed as to the law applicable to the case under the evidence. Defendant confines its objection to the giving of instructions number 4 and 6. Number 4 is as follows:

"The court instructs the jury that it was the legal duty of the defendant, City of Chicago, to exercise ordinary care to and towards maintaining the public sidewalks in

West Harrison street, at the place in question, in a reasonably safe condition for ordinary travel thereupon."

This instruction correctly states the duty of the City to maintain public sidewalks in a reasonably safe condition for ordinary travel. That duty is imposed upon the City by law.

Instruction number 6 sets forth Section 3562 of the ordinances of the City. As we have hereinbefore held that the ordinance was properly admitted in evidence, it follows that the instruction to the jury reciting such ordinance was, in view of the evidence, proper to be given. The court committed no error in the giving of instructions numbered 4 and 6.

We think the instructions as a whole fulfill the requirements laid down in Brennan v. City of Streator, 256 Ill. 472, where the court said:

"It may be said that the instruction was general in its nature and did not undertake to state the facts upon which a verdict might be rendered, and that the court, in other instructions in which the facts necessary to be proved to entitle the plaintiff to a verdict were stated, did require the plaintiff to prove that she was using all due care and caution for her own safety, and expressly told the jury that unless they believed, from the evidence, that the plaintiff was in the exercise of due care on her part and was guilty of no negligence which in any way contributed to the injury, their verdict must be for the defendant."

These conditions were included in the instructions given. City of Sandwich v. Dolan, 141 ibid. 430. As said in Roumboz v. City of Chicago, 332 ibid. 70:

"Nevertheless the overwhelming weight of authority is to the effect that the superintendence and care of the streets and alleys of a city, and all that directly pertains thereto, are peculiarly in the class of municipal duties for the neglect of which the city, in its corporate character is liable."

This has cogent application to the facts in proof in the case at bar.

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Defendant lastly argues that the damages awarded by the jury are excessive. In this we are unable to concur. The injuries suffered by plaintiff were painful and continued for a long time and entirely disabled her from walking or going about her usual business and affairs, resulting in her being compelled to pay out a large amount of money in medical fees, hospital bills, nurses and other attention made necessary by the accident. We think that the jury's award of damages was moderate and compensatory only and in no aspect of the case can be called excessive.

The record before us discloses no legal reason why the judgment of the Superior Court should be reversed. It is therefore affirmed.

AFFIRMED

WILSON, P.J. AND WYNER, J. CONCUR.

33144

BENJAMIN E. LANGGUTH,

Appellee,

v.

EDWARD BREITHEB,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 26, 1929

MR. JUSTICE RYNER delivered the opinion of the court.

The plaintiff brought suit in the Municipal Court of Chicago against the defendant. His claim was for \$160.00 of back salary, \$292.00 car fare and \$133.80 representing unpaid commissions. There was a trial without a jury and the trial court gave the plaintiff judgment for the full amount claimed. The defendant perfected this appeal, which is undefended.

The defendant was president of the Up-Rite Construction Company, which was engaged in the business of constructing garages and small cottages. He also solicited paving contracts for the Schmidt Construction Company. He employed the plaintiff to solicit contracts for paving. The plaintiff was employed from June 15, 1924 until May 2, 1927 at a salary of \$40.00 per week. The plaintiff testified that, in addition to the stipulated wages he was to be reimbursed for car fare expended by him while engaged in the performance of his duties. His testimony was corroborated by the testimony of his two daughters. The defendant denied having ever agreed to reimburse the plaintiff for car fare. Subsequent to May 2, 1927, the plaintiff was employed upon a commission basis.

In support of his claim for reimbursement on account of car fare the plaintiff testified that it amounted to "about \$3.00 a week and over, but I marked it down to \$2.00." He presented no memorandum in support of his testimony and gave no information

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as to whether he spent any money for car fare in connection with the performance of his duties. He said that during his three years of employment he spoke to the defendant many times about the matter but always received the response that the defendant would check up the amount due. This was flatly denied by the defendant. It is evident that the testimony of the plaintiff as to this item was nothing more than a mere guess and of no value as evidence.

The plaintiff's evidence as to the amount of unpaid commissions was of like kind. Without any supporting proof he made the bald assertion that there was a certain amount due him on account of each of several contracts. Finally, he admitted that he had begun the solicitation of several of the contracts prior to his employment upon a commission basis. According to the uncontradicted testimony of the defendant the plaintiff was overpaid as to commissions and in an amount in excess of anything due him on account of wages.

As to the item of wages the plaintiff said that when he quit working at a fixed rate of wages per week the defendant owed him \$180.00. He further stated that he received no checks from the defendant after the first week in May, 1927. But the defendant produced upon the trial of the case three checks, each for \$40.00 and bearing the dates May 6, May 12, and May 19, 1927, respectively. Each check had endorsed on the back thereof the name of the plaintiff. When he was shown the checks he said that the signatures on the backs looked like his. Being pressed for a definite answer he resorted to the time-worn evasive response that the signatures looked like his but that he would not swear to it.

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Considering the evidence of the plaintiff in the most favorable light he had \$40.00 due him on account of wages. But he had been overpaid more than that amount on account of commissions. Having failed to make competent proof of the right to reimbursement for car fare expended, he was not entitled to recover anything from the defendant.

The evidence produced was wholly insufficient to support the finding and judgment of the trial court.

The judgment of the Municipal Court is, therefore, reversed, without remanding the cause.

REVERSED.

WILSON, F.J. AND HOLDOM, J. CONCUR.

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33212

SAMUEL MORELL, JR.,

APPELLEE,

v.

G. FRANK GROISSANT,

APPELLANT.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed June 26, 1929

MR. JUSTICE RYMER delivered the opinion of the court.

On June 29, 1925, the plaintiff deposited \$50.00 on account of the purchase price of a vacant lot of ground to be later selected in a certain subdivision in Cook County, Illinois, and received in return a receipt and agreement as follows:

G. FRANK GROISSANT
360 North Michigan Ave., Chicago
Phone Central 6870

Copy Ch. 50/100
6/30/25

PURCHASER'S RECEIPT

PRELIMINARY AGREEMENT.

Chicago, Ill., June 29, 1925.

I C. Morell, Jr., hereby tender to you, as agent, the sum of \$50.00 as earnest money on purchase (subject to prior sale) of the following described Vacant Lot situated in Cook County, Illinois: Lot ____ To be selected in Gooden's Corner Sub. 9 or 13 preferred of the Gooden's Corners Selected. Block ____ Addition ____

which I agree to purchase and to pay therefor, the sum of Twenty-four hundred dollars, as follows: Cash herewith \$50.00, additional payment of \$750.00 on or before seven days. Contract to be given when \$800.00 is paid; Balance in monthly installments of \$48.00 or more.

Payment shall be completed within 36 months; taxes for the year 1925 to be paid by purchaser. Interest at the rate of six per cent (6%) will be charged on the whole sum remaining from time to time unpaid and on all delinquent payments.

No salesman has authority to alter this agreement in any particular, and it is hereby understood that neither the G. Frank Groissant Organization, nor the owner is bound by any representations, agreements, terms or conditions not contained herein.

I agree to sign, when called upon so to do, your

Opinion filed June 21, 1953

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Vacant Lot Contract, in use for the sale of this property. If I fail to perform my obligations promptly at the time and in the manner herein specified, the earnest money paid herewith shall, at your option, be forfeited as liquidated damages and this instrument shall become null and void.
Purchaser Samuel Moreell Jr.
Street Address 310 So. Mich. Ave.
City Chicago.

Phone Wab. 1308
G. FRANK GROISSANT

By Dewitt Foster
Salesman."

On the following day he entered into a written contract to purchase a particular lot in one of the subdivisions mentioned in the so-called preliminary agreement. It acknowledged receipt of the \$800.00, provided to be paid under the preliminary agreement before a final contract would be executed. The contract was executed by the Union Bank of Chicago, Trustee, as vendor and by the plaintiff as purchaser. Among other provisions it contained one in large type as follows:

"VENDOR WILL NOT RESELL ABOVE DESCRIBED
PROPERTY FOR PURCHASER."

It concluded with the following:

"The undersigned has read and understands the whole of the above contract, and now states and in consideration of the contract agrees, that no representation, promise or agreement not expressed in the contract has been made to induce the undersigned to enter into it."

On October 20, 1926, the plaintiff instituted suit in the Municipal Court of Chicago against the defendant, G. Frank Groissant. A jury trial was waived, and he recovered a judgment for \$800.00. His case was based upon the claim that Dewitt Foster, who signed the receipt and preliminary agreement as salesman for the defendant, agreed that, in consideration of the plaintiff entering into a contract with the Union Bank of Chicago for the purchase of the property in question, the defendant would, within a reasonable time after the signing of the contract resell the property at a profit to the plaintiff. No resale was made. The

plaintiff failed to make the payments as called for by the contract and the Union Bank of Chicago exercised the right to declare a forfeiture.

It is apparent that the plaintiff makes no contention that the final contract provided for a resale of the property or that anything was said or done in connection with its execution which imposed this obligation upon anyone. In fact the contract contained an express provision that the seller would not resell for the purchaser.

In reply to the contentions made on behalf of the defendant that all oral statements and promises were merged in the preliminary agreement counsel for the plaintiff replied that this agreement was unilateral and represented only a part of an oral contract which was partly oral and partly in writing. We fail to perceive the force of this argument. The instrument is in form an offer on the part of the plaintiff stating the terms and conditions upon which he will contract for the lot in question. It expressly provides that no representations or agreements of the salesman, not contained in the instrument, should be binding either upon the defendant or the owner of the property. The defendant's name was signed at the bottom of the agreement by the salesman DeWitt Foster, and his authority so to do is not questioned. This signature could serve no purpose other than to signify an acceptance of the plaintiff's offer. If this be true then the contract was bilateral and its terms and conditions binding upon both parties.

Furthermore, the plaintiff was put upon notice by the writing itself and the manner of its execution that he was dealing with the salesman of an agent who was without authority to make any agreement other than that evidenced by the document. This is true whether the agreement be held to be unilateral or bilateral.

Some attempt was made by the plaintiff to show that, the salesman having made an agreement to resell at a profit, there was a ratification of this promise by the defendant. It is argued that because the defendant received checks from the plaintiff aggregating the sum of \$800.00 and deposited them in his account there was a ratification. This point is devoid of merit. There is no evidence that the defendant had any knowledge, at any time, of any promise made by Foster, the salesman. The plaintiff also testified that he talked to several agents and representatives in the office of the defendant about a resale of the property and in each instance was promised that an effort would be made to effect a resale of the property. This was denied by the defendant's witnesses. There was no proof of a recognition of liability made by any representative of the defendant and no proof of authority to ratify on behalf of the defendant any promise made by Foster.

There is not sufficient competent evidence in the record to support the finding and judgment of the trial court.

For the foregoing reasons the judgment of the Municipal Court of Chicago is reversed and judgment entered here in favor of the defendant.

REVERSED AND JUDGMENT HERE.

WILSON, P.J. AND HOLDOM, J. CONCUR.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

253 I.A. 627²

BE IT REMEMBERED, that afterwards, to-wit: On

1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In The

Second District

October 11, 1928.

ILLINOIS OIL COMPANY, a
Corporation,

vs.

FRANK D. WILSON, H. H. H. WILSON,
JAMES H. WILSON, and SPECIAL SERVICE TANK CAR
CORPORATION,

Appellants

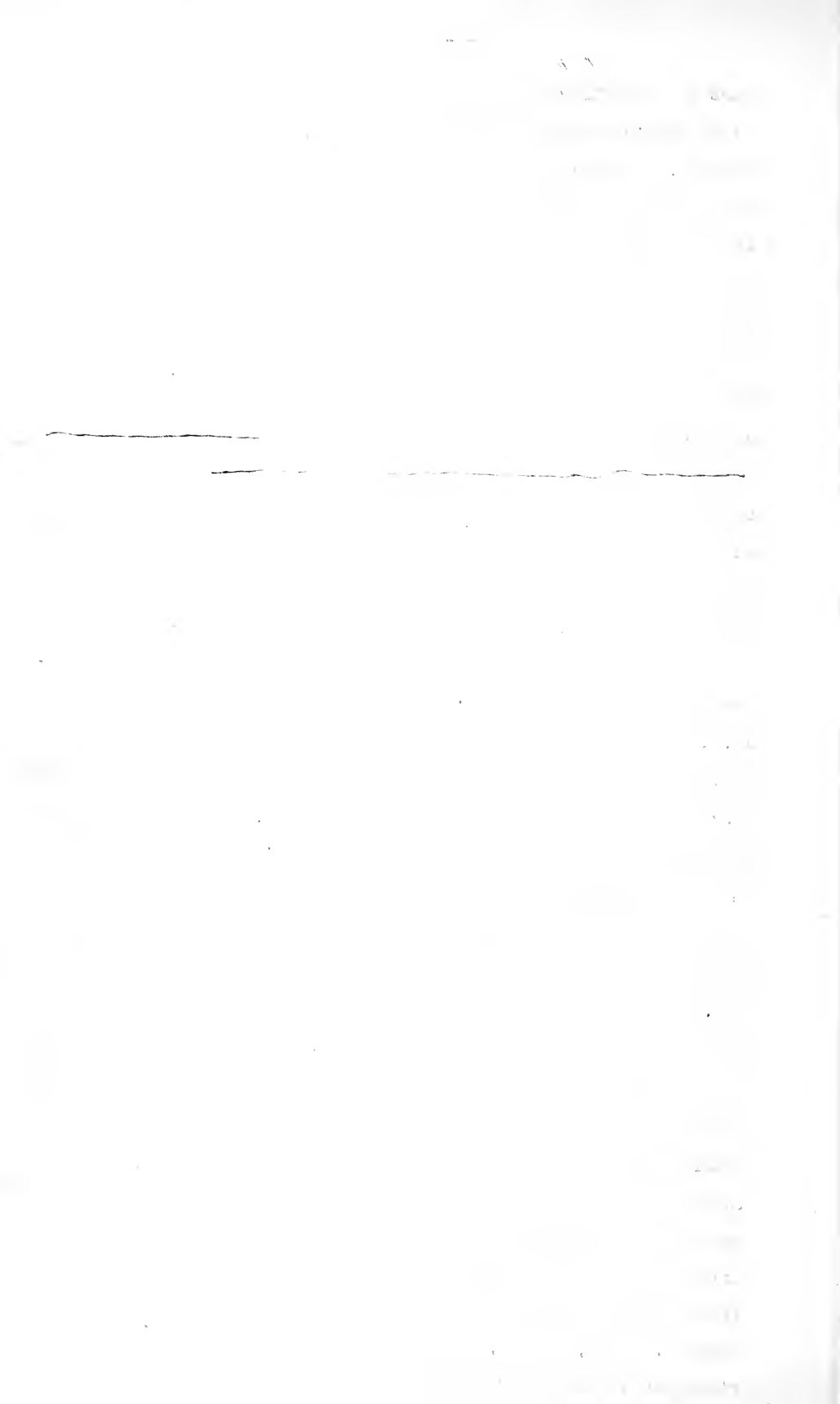
Appeal from the
Circuit Court of
Rock Island County.

OPINION by BRUCE, J.

On May 14, 1923, appellee filed a bill in the Circuit Court of Rock Island County, setting forth that on December 1, 1922, it was the owner of 32 tank cars, initialed I. O. O. K.; that appellant Frank D. Wilson was its treasurer and one of its directors, and held a like position with appellant Illinois Oil Company; that he, Wilson, fraudulently "intended to deprive your orator of the owner ship of said tank cars, * * * of the value of, to-wit, \$50,000," caused appellee to execute, without consideration, to execute 22 promissory notes of 1000. each, payable to bearer, two of said notes falling due on June 1, 1924, and two on the first day of each of January and June thereafter; that on said day appellant Wilson fraudulently caused a so-called lease to be executed by appellant Rock Island to appellee on said tank cars, and that it was falsely recited in said lease that appellee "desired to obtain and retain possession and use of said cars, and were without funds to pay for the full price and value of all of said cars, and had arranged for the advancement of additional funds, which, together with the funds theretofore paid, in the aggregate equalled the price and value of said

cars"; that "for the security of the funds to be advanced, the title to said cars should be vested in R. H. Luckenbill as trustee, and such cars should be delivered to and remain in the possession of your orator, subject to the terms and conditions in said agreement set forth"; that said cars were fully paid for, and that appellee was not in need of additional funds for said purpose; that said notes were taken and held by appellant Welch; that several of said notes had been paid, and that, without default in the payment of any of said notes or interest, appellant Welch declared the whole of said indebtedness due, ~~and appellant Welch declared the whole of said indebtedness due, and caused~~ appellant Luckenbill to notify appellee that he, Luckenbill, would at public sale, by virtue of the authority in said lease, sell said cars on May 10, 1926, and averred that, unless restrained by order of court, said trustee would sell said cars.

To said bill, appellants were made parties defendant. Amendments were filed to said bill, setting forth that on May 18, 1926, after said bill of complaint had been filed, and after notice to said trustee and appellant Welch and the General American Tank Car Corporation, appellant Luckenbill purported to sell said cars pursuant to said notice; that said sale was null and void, for the reason that said cars were not in Putnam County or in possession of said trustee at said time; "that if the said so-called lease be treated as a chattel mortgage, it was fraudulent and void as to your orator, for that the said Frank P. Welch was a large stockholder and a director and president of the Illinois Oil Company; that he was the treasurer, director and general manager of the Illinois Refining Company; that he was a director and treasurer of the Kawfield Oil Company; that said purported lease, including the clause of forfeiture therein, was executed without the knowledge or consent of the stockholders of your orator, and afterward the said instrument was attempted to be ratified by certain of the directors of your orator, under the direction of said Frank P. Welch, and he, the said Welch, participated in the attempted ratification thereof likewise without the knowledge



of the stockholders of your orator, * * * That said Illinois Oil Company was then in the possession of said tank cars, and had a pretended claim of some \$14,000 against your orator, and was interested in obtaining said notes, or the proceeds thereof, to pay its said claim; that the said claim was inequitable and unjust, and not justly owed to your orator; that the said Frank J. Welch had a pretended claim against your orator, also inequitable and unjust, to the amount of \$12,000 * * * that no disinterested officers of your orator originated or carried out the execution of said notes or lease, nor did a disinterested majority of its directors ever authorize or ratify the execution thereof." That appellant Welch came into possession of said notes "with full knowledge of all the facts and circumstances aforesaid; that the said pretended foreclosure is part and parcel of said scheme to deprive your orator of said tank cars, and is oppressive, unjust and contrary to equity."

Appellants and the Kawfield Oil Company were made parties defendant, and said bill as amended prayed that said pretended sale be set aside, that said unpaid notes and lease be ordered delivered up and canceled, and that said tank cars be delivered to appellee, etc.

To said bill as first amended, joint and several answers were filed by appellant, being all of said defendants except the Kawfield Oil Company, which was defaulted. Said answers, among other things, set forth that the president of appellee company and the president of Kawfield Oil Company each resided in the state of Oklahoma, and conducted the business of said corporations in said state; that said lease was executed and acknowledged in the state of Oklahoma, and that it should be construed according to the laws of said state.

Said answer denied all the allegations of said bill to the effect that appellant Welch dominated the affairs of appellee company, denied that said notes and lease or mortgage securing the same were given without consideration.

Said bill was further amended, after the filing of

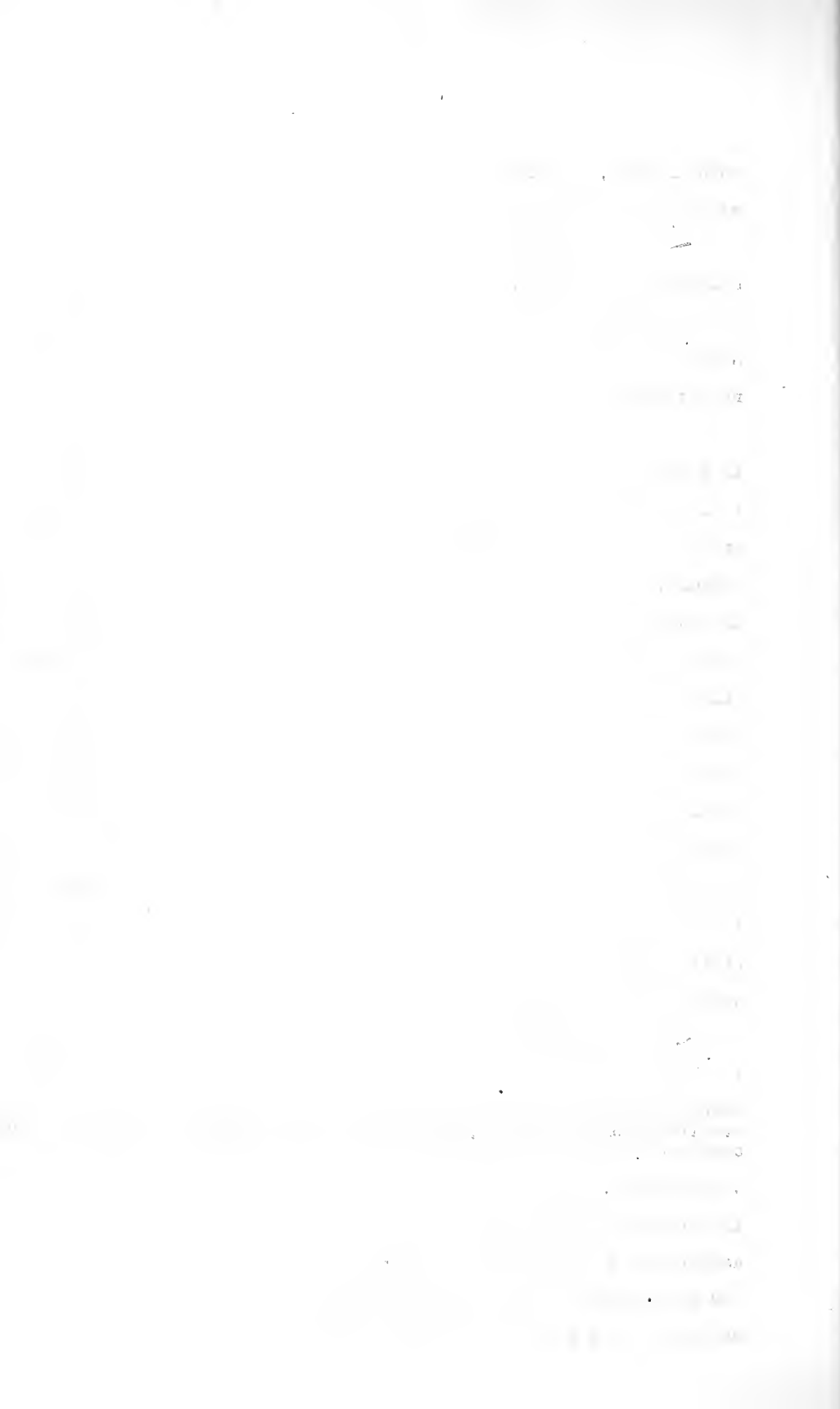


said answers, by striking out the verbiage to the effect that said notes and lease were given without consideration.

The cause was referred to the master to take the evidence and to report the same, together with his conclusions of law and fact thereon. The master, after taking the evidence, made report of the same, together with his conclusions, to which report exceptions were filed.

On the hearing, the court overruled said exceptions in part and sustained the same in part, and found "that there is no issue as to whether complainant was indebted to the defendants Frank Welch, Illinois Oil Company and Newfield Oil Company, or either of them, in the year 1920, at the time of the loan, or as to whether the said defendants or any of them were then or thereafter indebted to the complainant Illinois Refining Company, the bill of complaint having been amended to expressly eliminate this issue"; that the Newfield Oil Company does not now have and has never had any interest in the 22 tank cars, or the use thereof, or the revenue therefrom; that the so-called lease introduced in evidence in this cause creates an equitable lien in the nature of a chattel mortgage on the said tank cars, in favor of the holder of the notes, which lien is still a valid and subsisting lien, so long as the said notes have been satisfied."

The court further found that it was the understanding and agreement of the parties to the so-called lease that the revenue arising from the operation of said tank cars should be credited upon said notes, and that all such earnings ought to be so credited; that no default existed at the time said default was declared, and that the sale of said tank cars was, for that reason, unauthorized and void. It was ordered that an accounting be taken as to revenues collected by appellant General American Tank Car Corporation, the purchaser at said purported sale, and if the revenues collected were



not the reasonable value of the use of said cars, that said company be required to pay the reasonable value thereof"; that appellant Illinois Oil Company account to appellee for all net rentals and mileage or revenue collected for the use of said cars prior to said sale and not accounted for, and that same be credited on said notes as of the date of such collection.

To reverse said decree, appellants prosecute this appeal.

The record discloses that, prior to December 1, 1923, appellant Welch was a stockholder and director in appellee Company, appellant Illinois Oil Company and in the Kawfield Oil Company. Appellee refining company and the Kawfield Oil Company were distributing companies, while appellant oil company was a refining company. On December 1, 1923, the board of directors of appellee company consisted of Charles W. Welch, appellant F. P. Welch, John H. Harvey, J. J. Armstrong and J. M. Welch. Appellant F. P. Welch, J. J. Armstrong and C. W. Welch were also directors in the Illinois Oil Company, which latter company had nine directors. The directors of Kawfield Oil Company were ~~was~~ appellant W. C. Welch, M. W. Sattles and John H. Harvey. The principal place of business of appellee company and of the Kawfield Oil company wasushing, Oklahoma. The principal place of business of appellant oil company was Rock Island, Illinois. All of said corporations, however, were organized under the laws of the State of Illinois, and the place of residence of each of said corporations was Rock Island, Illinois. Appellant F. P. Welch was president and general manager of the Illinois Oil Company, and the treasurer of appellee company. C. W. Welch was president of appellee company.

The record discloses, and appellee concedes in its brief and argument, that prior to December 1, 1923, it was "practically

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insolvent, and threatened with utter failure and bankruptcy. The one resource that it had was the 32 tank cars involved in this suit." For some time prior to said date, efforts had been made to procure a loan on said cars. The best loan obtainable so far as the record discloses, was for a \$1,000 per car, due five years at 7% per annum, with a cash commission of \$3,000 and the expenses incident thereto. Appellant Welch finally loaned appellee said amount on the same terms, without any commission, secured by the lease or chattel mortgage in question. There was some controversy with reference to whether the instrument securing said loan was in legal effect a chattel mortgage. The court found it to be such and counsel on both sides practically acquiesce in that finding. Out of the proceeds of said loan, a claim of appellant oil company of \$14,704.87 was paid, \$12,000.00 was retained by appellant Welch, to repay a draft of \$12,000.00 made on him by appellee company during the perfecting of said loan, to take care of bills that were pressing for immediate payment. \$1,947.58 was also retained by Welch to reimburse him for the amount paid by him to take up note of appellees on which he was a surety. The incidental expense in the making of said loan was \$117.55, leaving a balance of \$3,238.50, which was paid to appellee.

Appellee company, after the making of said loan, on or about April, 1924, drew on appellant Welch for \$4,500, which draft was honored, and to cover that and other indebtedness owing by appellee company to appellant Welch, two notes of \$4,000 each, dated July 17, 1924, due ninety days after date, were executed by appellee company to appellant. Prior to the making of these subsequent advancements to appellee company, the principal of the \$32,000 indebtedness had been reduced to \$28,000 by the application of the tank car earnings thereto. After said time, appellant Welch applied the rents

[illegible]

and earnings from said cars toward the payment of his unsecured notes for moneys advanced subsequent to the execution of said least or mortgage. By so doing, the interest was allowed to lapse on said indebtedness, and certain of said notes falling due, remained unpaid. Appellant Welch thereupon directed appellant Luckenbill as trustee to declare the whole of said mortgage indebtedness due and payable. Pursuant thereto, said trustee gave notice to appellee company and to others interested that he would take possession of said cars and would sell them on May 15, 1926, to satisfy said mortgage indebtedness, all of which he was then and there declaring due and payable. To enjoin said sale, the bill was filed as above stated.

The charge in the bill as originally filed, and as first amended, that the notes in question were given without consideration, was abandoned by appellee, and the charge of any actual fraud on the part of appellant Welch in connection with the execution of said notes and mortgage is without any proof to sustain it. This is practically conceded by counsel for appellee. The issues involved, as stated by counsel for appellee in their brief and argument, are as follows:

"By the decree entered in this cause, from which appeal is being prosecuted, the learned Circuit Judge held:

"I. That the so-called lease created an equitable lien on the tank cars, in the nature of a chattel mortgage.

"II. That the sale of the tank cars on May 15th, 1926, under that lease was wrongful and should be set aside.

"III. That the lease was not voidable by the Illinois Refining Company, complainant.

"As to the first of these propositions, there appears to be no dispute. As to the second, defendants are not satisfied, and bring the case here on appeal. As to the third,

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the complainant is not satisfied, and has assigned a cross error on the record."

As the issues remaining for this court's determination are, we think, fairly stated in appellee's brief, the first question for our determination is as to whether or not the court erred in setting aside the sale made by Luckenbill as trustee.

It is contended by counsel for appellee, in support of the decree, that "the foreclosure sale was and is invalid, because not carried out in accordance with the terms of the statute."

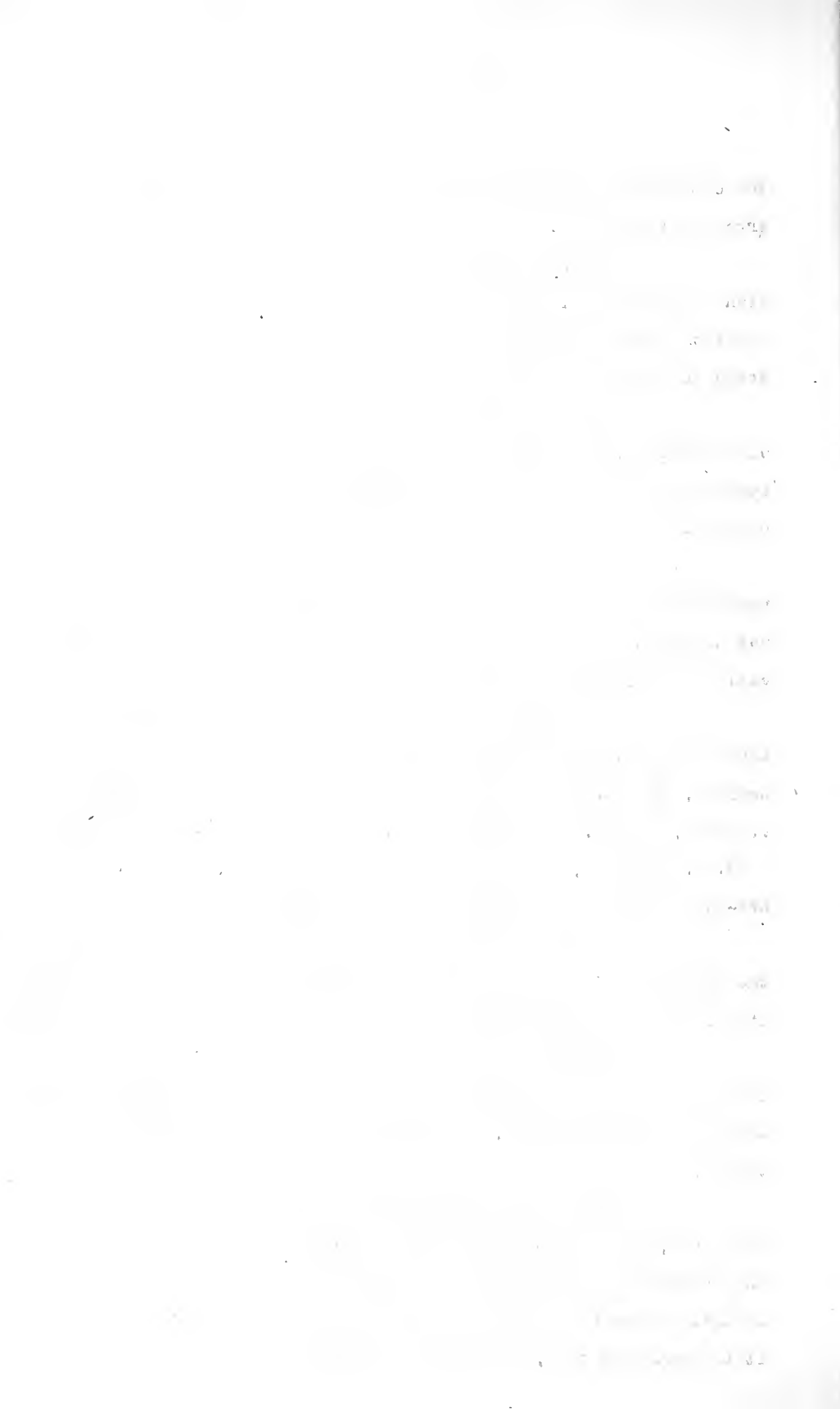
It is conceded by counsel representing appellee and representing appellants, that the interests of third parties are not involved. The question then is as to whether said sale was valid as against appellee.

A chattel mortgage may be valid and enforceable as against the mortgagor, even though void as to creditors. *Craig v. Sanford*, 24 Ill. 17; *Forrest v. Turnham*, 29 Ill. 141; *McDowell v. Scott*, 83 Ill. 538; *Greenborn v. Wheeler*, 90 Ill. 296; *Bering & Co. v. Washborn*, 141 Ill. 153; *Barchard v. Kohn*, 157 Ill. 579-584. In the latter case, the court at page 583 says:

"As the mortgage was not recorded, and provided for the sale of the goods mortgaged in the ordinary course of business, it was void as to creditors, but it was good as between the parties."

Counsel for appellee insist that the sale was void for the reason that the mortgagors did not reside in Putnam County, where said sale was made, and that said cars were not in said county.

One of the cars was in Granville on the day of said sale, subject to inspection by prospective purchasers. If the purchasers saw fit to bid on said cars upon their examination of one, we see no reason why appellee should complain, unless it be contended that, by reason thereof, said cars sold for an



inadequate price. Appellee is not in a position to raise this point. After notice to it of said alleged default and prior to said sale, appellee company, through its president and R. D. O'Brien as receiver for Kawfield Oil Company, served notice that "the undersigned owners of the said cars, have negotiated the sale of same to the North American Car Company at \$1,000 per car, clean, payments to be made on delivery of said cars to the American Car Company at Tulsa, Oklahoma, or Coffeyville, Kansas, together with good title, free and clear of all incumbrance."

There is no contention that appellant General American Tank Car Corporation did not comply with its bid. Appellant Welch testified on cross examination, with reference to said tank cars:

"For a period of three or four months before the stockholders' meeting in 1926, we were dealing on sales that we thought we could make - - * * *. After that meeting, I had a proposition from a tank car company - - a very fair offer to buy the cars. I took the offer to Mr. Cleaveland and Mrs. Halligan (directors of appellee). * * * They agreed as to the price being fair, but they wanted me to cancel another note with it. * * * The price I could sell the cars for then was \$32,000. cash."

As the interests of third parties are not involved, as said sale was made for the market value of said cars, and as there is no proof of any fraud in connection with said sale, appellee is not in a position to complain that the provisions of said lease or chattel mortgage may not have been strictly followed in making said sale. *Waite v. Denison*, 51 Ill. 319-322.

It is also insisted by appellee that the foreclosure sale was invalid and unauthorized, because there had been no default which would be recognized as such by a court of equity." The position taken by appellee is, that because in certain correspondence appellant Welch indicated that he might be able to procure

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describes the general situation
of the country and the
state of the economy.
It also mentions the
political situation and
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2. The second part of the document
describes the situation in the
provinces and the state of the
economy.

3. The third part of the document
describes the situation in the
provinces and the state of the
economy. It also mentions the
political situation and the
state of the army.

4. The fourth part of the document
describes the situation in the
provinces and the state of the
economy. It also mentions the
political situation and the
state of the army.

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describes the situation in the
provinces and the state of the
economy. It also mentions the
political situation and the
state of the army.

a loan of \$1,000 per car for appellee, provided the earnings of the cars would go in payment of the interest and principal, that Welch was therefore not authorized to apply said rentals in reduction of appellee's subsequent unsecured indebtedness to him.

Said contract or lease contained no provision in reference to the application of said earnings. We therefore hold that Welch, having furnished funds subsequent to the making of said chattel mortgage, which funds were necessary in order to keep appellee a going concern, had the right to apply said rents and earnings in payment thereof, especially in view of the fact that said amounts so advanced were past due and unpaid at the time said earnings were so applied. The court erred in holding that there was no default.

One of appellee's principal contentions is that, by reason of the fact that appellant Welch and certain of his relatives were directors and officers in each of said companies, that therefore this court should hold that appellant Welch, in dealing with appellee company, was in fact dealing with himself.

As a general proposition, a director may deal with the corporation of which he is a director. *Beach v. Miller*, 130 Ill. 162-169, citing *Merrick v. Peru Coal Co.*, 61 Ill. 479; *Harts v. Brown*, 77 Ill. 226.

"A director or stockholder may trade with, borrow from or loan money to the company in which he is a director, in like manner as with persons." *Harts v. Brown*, supra, 231. To the same effect is *Off v. Jack*, 204 Ill. 75-81. A director of a corporation may loan it money or render it services, and maintain an action against it therefor. *Beach v. Miller*, supra; *Mullanphy Savings Bank v. Scott*, 135 Ill. 655; *Illinois Steel Co. v. O'Donnell*, 136 Ill. 624; *Off v. Jack*, supra, 81.

In *Illinois Steel Co. v. O'Donnell*, supra, the court at page 633 says:

"The law is, that the directors or officers of a solvent corporation, acting in good faith, may deal with it and loan it money and take security therefor, and that the subsequent insolvency

of the corporation will not affect their rights of action to recover such loans or enforce their securities. *Mullanphy Savings Bank v. Schott*, 135 Ill. 655."

At page 634-635, the court further says:

"There is a marked difference between a case where a mortgage or other preference is ~~is~~ given by an insolvent corporation to a director or officer to secure a pre-existing indebtedness and a case like this, where the corporation, though in fact insolvent, in the sense above stated, is a going corporation that is seeking to accomplish the objects of its incorporation, and the security is given to directors for moneys actually and in good faith loaned, at the time the security is given, to such embarrassed corporation, and for its benefit/." Citing *Harts v. Brown*, *supra*; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Sutton Manf. Co. v. Hutchinson*, 11 C. C. App. 320.

"A rule that would prevent directors and officers of financially embarrassed corporations, acting in good faith and for the apparent benefit of such corporations, from loaning them money and at the same time taking from them security for repayment, - the terms and conditions being such as are in accord with the usual course of business, - would be highly injurious to corporations themselves, and frequently detrimental to the interests of their creditors. The line of demarkation that separates valid from invalid preferences to directors or officers of insolvent corporations lies between already incurred liabilities and liabilities assumed by going corporations at the time the security is given and taken."

It should be observed, however, that no question arises here with reference to preferences as against other creditors of appellee. As the rights of other creditors are not here involved, the limitations discussed in the above case would not be applicable here.

Counsel for appellee concede that the execution of said notes and lease or chattel mortgage was ratified ^{by} ~~for~~ four of the directors of appellee company, but insist that said ratification

It is the duty of the State to protect the rights of its citizens and to maintain the peace and order of the State. The State has the right to regulate the conduct of its citizens and to enforce the laws of the State. The State has the right to tax its citizens and to collect the taxes. The State has the right to maintain a standing army and to use force to enforce the laws of the State.

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was procured through the domination of appellant Welch, that it was in fact a fraud on the rights of the stockholders in said company and that said transaction may be inquired into for the benefit of said stockholders. In support of this proposition, counsel cite Bingham v. Bell & Zoller Coal Co., 170 App. 469.

So far as this record discloses, at the time said loan was procured, the only stockholders of appellee company may have been the five directors. Aside from that, however, the stockholders are not complaining. Neither appellee nor its stockholders were injured by reason of the loan made by appellant Welch to it, as it is conceded that, at that time, appellee was insolvent, but a going concern.

For the reasons above set forth, the decree of the trial court will be reversed, and the cause will be remanded, with directions to dismiss said bill for want of equity.

Reversed and remanded, with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the ~~Seventh~~ day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2531A.027³

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 04 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Olga McNeil Smeker, appellee, :
vs. :
Joe Smeker, appellant. : 20, :

APPEAL FROM THE
CIRCUIT COURT OF
STEPHENSON COUNTY
ILLINOIS.

Jones P. J.

In March, 1928, appellee filed her bill for divorce charging appellant with acts of cruelty, and praying for an injunction and alimony. A temporary writ of injunction was issued. Later appellant was brought into court by attachment on a charge of violating the injunction. He employed Louis F. Reinhold, as his counsel. The said attorney entered his written appearance and the record shows that his employment was never terminated. Reinhold conferred with one of appellee's solicitors. A reconciliation was effected and the parties resumed their marriage relations at the dwelling of appellant, where they had resided before the institution of the proceeding for divorce.

During the March term, appellee's solicitors petitioned the court for alimony and solicitor's fees. At the suggestion of a man named Solomon, appellant also employed L. A. Jayne, then state's attorney of Stephenson County, to represent him. When Jayne was so employed, he did not know that Reinhold was employed or that he had an entry of appearance on file. Jayne represented appellant in the matter of the petition for alimony and solicitor's fees. At that time he discovered Reinhold's entry of appearance and refused to further represent appellant. At the September term, 1928, appellee amended her bill of complaint and charged in substance the same acts of cruelty as were stated in the original bill, that appellant had promised in open court to thereafter conduct himself properly toward her, if she would forgive

Oleg Joseph Smekov, appellant,
vs.
Joe Smekov, appellant.
Jones I. v.

In January, 1986, the appellant, Oleg Joseph Smekov, was arrested on a charge of violating the laws of the State of California, and was held in custody at the County Jail in San Diego. The appellant, Joe Smekov, was arrested on a charge of violating the laws of the State of California, and was held in custody at the County Jail in San Diego. The appellant, Oleg Joseph Smekov, was arrested on a charge of violating the laws of the State of California, and was held in custody at the County Jail in San Diego. The appellant, Joe Smekov, was arrested on a charge of violating the laws of the State of California, and was held in custody at the County Jail in San Diego.

During the trial, the court was informed that the appellant, Oleg Joseph Smekov, was a man named Oleg, and that the appellant, Joe Smekov, was a man named Joe. The court was also informed that the appellant, Oleg Joseph Smekov, was a man named Oleg, and that the appellant, Joe Smekov, was a man named Joe. The court was also informed that the appellant, Oleg Joseph Smekov, was a man named Oleg, and that the appellant, Joe Smekov, was a man named Joe. The court was also informed that the appellant, Oleg Joseph Smekov, was a man named Oleg, and that the appellant, Joe Smekov, was a man named Joe.

him and resume their marriage relation; that he had violated such agreement and had committed further acts of cruelty since the resumption of the marriage relation.

In response to a written request from appellee's attorneys, appellant went to their office with appellee, and signed a written entry of appearance in said cause to the September term of court and on the same day, a hearing was had and a decree of divorce granted. No notice of this meeting was given to Jayne or Reinhold. The decree found that the parties had stipulated in reference to a property settlement and that in accordance with the terms of that stipulation, appellee should have all the household and kitchen furniture, a Willys Knight automobile, and the sum of \$1000. Appellant should also pay \$150 as and for her solicitor's fee and the costs of suit. It appears that when the parties came out of the office of appellee's solicitors, Jayne was in the hall-way and there was some talk about the case. Jayne testified that appellee's solicitor told him they had entered into a stipulation to get a divorce, and that he, Jayne, said he was out of the case and so far as he was concerned, they could go ahead. When the decree was entered, appellant was not present in person or by counsel.

Appellant was a man 46 years of age. He was born in Austria, and what education he had was received there. He could read simple English and sign his name. During the 20 years previous to his marriage, he had been a resident of Freeport and was employed in a round-house of the Illinois Central Railroad Company. Prior to his marriage to appellee on December 17, 1927, he had never been married. She was then 30 years old, had been previously married and had a son 10 years of age. At the time of the marriage, appellant owned a \$7,000 residence, subject to a mortgage of \$2200. He also owned a Willys Knight sedan, and purchased \$2500 worth of household goods. The parties lived in his house until appellee filed her bill for divorce the following March. She now contends that at the meeting at

which appellant signed an entry of appearance, a property settlement was made between the parties, whereby it was stipulated that she was to have all the household goods, the automobile, and \$1,000 in cash; that appellant was to pay the expenses of the litigation; and that she was to release him from all other claims.

Appellant filed a petition to set aside the decree. In it he denied all the material allegations of the bill as amended, and he denied that any agreement as to a property settlement had been entered into between the parties. At the hearing upon the petition and in response to a very leading question, appellee testified that a stipulation had been entered into. The testimony was merely a conclusion of the witness and it furnished no proof that an agreement was in fact made. A stipulation is an agreement entered into in open court, or written and signed by the respective parties and filed as a stipulation in the cause. The record is barren of any proof to support the finding that the parties "have stipulated" as to an adjustment of their property rights. But if this were not so, a serious error was committed in not barring appellee of all claim of homestead and dower. In her testimony above referred to, she stated that the stipulation provides that she should release him "from any other claims".

The parties had been married But a few months. Appellee contributed nothing to the property of appellant. The decree takes from him about one-half of what he had accumulated during his lifetime. Where a wife has contributed nothing to the property of her husband, the alimony granted should be for her support. (Cole v. Cole, 142 Ill. 19; Von Glahn v. Von Glahn, 46 id. 134.) Unless special reasons exist, the court should grant an annual allowance to be held under the control of the court. (Von Glahn v. Von Glahn, supra: Ross v. Ross, 78 Ill. 402; Shaw v. Shaw, 144 id. 586.) Without an agreement between the parties to that effect, the allowance was exorbitant.

It is urged by appellee that inasmuch as appellant did not file an answer to the amended bill at the time of filing his petition to set aside the decree, it was not error to deny the petition. The general rule is that on an application to vacate a decree a defendant should file an answer showing a meritorious defense, with an affidavit of its truth. (Berge v. Berge, 88 Ill. 164.) However, the verified petition to vacate the decree denies all the material allegations of the amended bill and prays the court to grant petitioner the right to answer the amended bill. Equity looks to the substance rather than the form. The fact that appellant did not file a formal answer with his petition is not sufficient to bar him from relief to which, in equity, he is entitled. His petition disclosed the reasons why the decree should be vacated as clearly and as definitely as an answer could have done.

We are of the opinion that the Chancellor should have set aside the decree. That decree will therefore be reversed and the cause remanded, with directions to the Chancellor to vacate the decree and to grant leave to the defendant to answer.

Reversed and remanded with
directions.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

259 I A. 6274

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 2, 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



| | | |
|---------------------------|---|------------------|
| GEORGE ROBERTS, | : | |
| | : | |
| Appellee, | : | |
| | : | APPEAL FROM THE |
| vs. | : | CIRCUIT COURT OF |
| | : | WOODFORD COUNTY |
| ORA A. BARNEWOLT, Jacob | : | |
| Muller, Carl Weisenhofer, | : | |
| and George H. Nappin, | : | |
| | : | |
| Appellants | : | |

Jones P. J.

Appellee, Roberts, filed his bill to enjoin the appellant, Carl Weisenhofer, from fishing and all appellants from hunting on a drainage ditch alleged to be located on a forty acre tract of land belonging to appellee, described as the Northeast Quarter of the Northwest Quarter of Section 21 in Township 28 North, Range 3 West of the Third Principal Meridian in Woodford County. A demurrer was sustained to the original bill. An amended bill was subsequently filed and joint and several answers were filed thereto by defendants. On the hearing, relief was granted as prayed in the amended bill. This cause comes to this Court by appeal from that decree.

The controversy concerns the right to use and possess a drainage ditch thirty feet in width. Roberts contends that such ditch is located along the north line of the forty acre tract above described, and that he was the owner and in possession thereof at the time this suit was instituted. Defendants claim that the ditch is located on the south side of land owned by them and described as the South Half of the Southeast Quarter of Section 16 in aforesaid township and range, and that appellee has failed to prove he was in possession of such ditch at the time he instituted this suit.

Both of said tracts of land were formerly owned by the three daughters of one William Hunter, now deceased. In September, 1915, B. F. Zinser, through articles of agreement, executed by Clara M. Hunter, acquired title to a strip of land

100 feet wide off of the North side of the forty acre tract in said Section 21, for the purpose of building and maintaining a levee of sufficient size to protect the land from overflow by the Illinois River.' In this conveyance nothing is said about a ditch. The levee mentioned therein was constructed by Zinser with the material excavated from the ditch and was built immediately south of and along the bank of the drainage ditch. Roberts contends that the ditch is wholly upon the one hundred foot strip of land which was purchased by Zinsmer for the purpose of building and maintaining the levee. Roberts derived title to said strip on September 30, 1926, through mesne conveyance, from said Clara M. Hunter.

The record discloses that Roberts acquired the forty acre tract owned by him on February 14, 1925, without any reservations or exceptions, and that he has used the land for fishing ever since he bought it; that he has also used it for hunting, has put duck pens thereon, and kept a watchman on the land during the hunting season. He is a commercial fisherman. He uses the forty acres above described in connection with forty acres adjoining it on the west for the purpose of obtaining fish for the market. The land has little value for any other purpose, except for duck hunting in ~~xx~~ proper season. He has an old cabin boat used for a clubhouse located on the levee just south of the ditch. Defendant Barnewolt, Muller and Nappin had a clubhouse on the land north of Roberts' land.

The weight of the evidence shows that the line between Sections 16 and 21 is along the north side of said drainage ditch. For many years it was marked and recognized by a line of old trees and a fence, portions of which still remain. At the time the conveyance to Zinser was made, the line of old trees was pointed out by the Misses Hunter as the division line between their property and the strip sold to Zins~~er~~. The testimony is voluminous and includes that of several surveyors. After an examination of the record we are of the opinion and find that

the drainage ditch and levee are located within the limits of the one hundred foot strip of land acquired by Zinsor and that such one hundred foot strip is wholly within the limits of the forty acres of land in Section 21 owned by Roberts.

Proof of possession by Roberts and his predecessors in title, under deeds purporting to convey the fee, is sufficient to support allegations of ownership and possession and to maintain a suit where appellants fail to show title. (Jobst v. Mayer 327 Ill. 423.) Occupancy of a part of land, claiming under deed to the whole, is construed as possession of the entire tract which the instrument purports to convey. (Burns v. Curran, 275 Ill. 448.)

Appellants deny the right of a court of equity to take cognizance of this cause and insist that the remedy, if any, is complete at law. One who owns a hunting privilege either by ownership of the land on which the game is found, or otherwise, will be protected in this right by injunction against continuing trespasses which interfere with or destroy this right. The same rule applies to fishing privileges. (26 C. J. Fish 621; 32 C. J. Injunctions, 149; 11 R.C.L. Fish and Fisheries, 1040.) In cases of continuing trespasses where there is no certain measure of damages or where the cost of redressing the injury amounts to more than the damage that might be recovered, the remedy at law is not adequate. A court of equity having acquired jurisdiction to grant equitable relief, will retain the case to do complete justice between the parties, although it becomes necessary to enforce purely legal remedies. (McIntyre v. McIntyre, 287 Ill. 544.) The chancellor did not err in determining that the drainage ditch is wholly upon the land of appellee or in granting the relief prayed by the amended bill.

We are of the opinion that the decree is correct and it is accordingly affirmed.

Decree Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of May, in
the year of our Lord one thousand nine hundred and twenty-nine,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

25011 0281

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 20 1929 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



In The
APPELLATE COURT OF ILLINOIS
Second District

February Term, A.D., 1929

PEORIA MOTOR CLUB, a Corpora-)
tion. Appellee.)

vs.)

Appeal from
Circuit Court
of

MOTORISTS ASSOCIATION OF IL-)
LINOIS, a Corporation,)
Appellant)

Peoria County
Illinois

OPINION by BOGGS, J.

An action in assumpsit was instituted by appellee against appellant in the Circuit Court of Peoria County. The declaration consisted of the common counts, accompanied by affidavit of claim. Appellant filed a plea of the general issue, accompanied by affidavit of defense. A jury was waived, and on the trial the court found the issues for appellee and rendered judgment against appellant for \$932.95. To reverse said judgment, this appeal is prosecuted.

The record discloses that appellee Peoria Motor Club is an Illinois corporation not for profit, and had been operating in the city of Peoria for the mutual benefit of its members. It had not been a financial success, and had incurred liabilities in excess of \$1,400. It had over 200 members, and had furnished motor service to said members for a stated fee per year. Appellant is also an Illinois corporation not for profit, having its principal place of business in the city of Chicago.

Desiring to extend its business throughout the central part of the state, appellant took up with appellee the matter of taking over its membership and assuming its obligations to the extent of

\$1,400. Said proposition and undertaking is set forth in the following letter written to the president of appellee, on August 4, 1926:

"Confirming our conversation relative to installing service of the Motorists Association of Illinois for members of the Peoria Motor Club with a view of taking over the entire organization, we beg to submit to you for your consideration and the Board of Directors, the following proposition.

"1. The proposition submitted to be acted upon by directors of the Club, taking for granted that they have authority to act and after consummation of the proposition that the name of the Club and the charter be kept alive and resignation of four directors to be replaced by four directors of the Motorists' Association of Illinois.

"2. We will issue a paid up membership card in the Motorists Association of Illinois to each member in good standing of the Peoria Motor Club to the expiration of such membership.

"3. We will assume the indebtedness of the Peoria Motor Club, not to exceed \$1,400. This indebtedness to be paid in full in 90 days.

"Immediately upon acceptance of this proposition by the Board and the carrying out of the plans we will install full Motorists' Association of Illinois service, including our money back guarantee discount plan for all members, complete touring service and the general service that goes with a membership in our association, for all members in Peoria county."

On August 13, appellee through its directors, wrote a letter accepting said proposition. Thereafter, on the same day, four members of appellee's board of directors tendered their written resignations. Appellant company at once took over the business of appellee conducting the same in the name of the Peoria Motor Club.

It is first contended by appellant that the evidence shows payment of the full amount of \$1,400. Appellant is not in a position to raise this point, inasmuch as it was not set forth in its affidavit of defense.

The grounds of defense set forth in said affidavit are as

follows:

"1. That the plaintiff never accepted the offer, which is contained in the letter, marked Exhibit 'A', attached to plaintiff's statement of claim.

"2. That the plaintiff has never acted upon and has wholly failed to perform any part of the alleged agreement.

"3. That the alleged agreement is illegal and against public policy."

Section 55 of the Practice act (Cahill's Stat., chap. 110, sec. 65), among other things, provides that a defendant, in his affidavit of merits, shall set forth that he verily believes he has a good defense on the merits to the whole or a portion of the plaintiff's demand, "specifying the nature of such defense." In construing this statute, the courts have held that a defendant is limited to the defenses specified in his affidavit. *Kadison v. Fortune Brothers B. Co.*, 163 App. 276-278; *Reddig v. Looney*, 208 App. 413-420; *Hunziker v. Mulcahey*, 215 App. 508-511; *Goddard Tool Co. v. Crown E. M. Co.*, 219 App. 34-38; *Colfax Grain Co. v. Bradford*, 225 App. 419-421. In *Goddard Tool Co. v. Crown Electrical Mfg. Co.*, supra, this court at page 38, in discussing this question, says:

"We have set forth the affidavits of claim and of merits in so much detail for the reason that, by section 55 of Chapter 110 of the revised statutes of Illinois, the respective parties are limited in their evidence to the matters controverted by their affidavit. Citing *Reddig v. Looney*, 208 App. 413; *Miller v. Thomas*, 200 Ill. 125.

Proof of payment could not be made under the affidavit in question. However, without reference thereto, the evidence clearly supports the finding of the court that \$472.61 was all that had been paid under said contract.

It is next insisted that the evidence fails to disclose acceptance of appellant's proposition. Without going into a detailed discussion of the evidence, it is only necessary to say that this point is not well taken. The evidence not only discloses

The first part of the report
deals with the general situation
and the second part with the
specific details of the case.
The third part contains the
conclusions and the fourth part
the recommendations.

The first part of the report
deals with the general situation
and the second part with the
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the recommendations.

an acceptance but that appellant in fact took over said business and operated the same.

It is next contended that it was necessary for appellee to show as a part of its case that the four directors who resigned immediately upon acceptance of appellant's proposition. Appellant took over said business without any request or suggestion as to the new members to be elected. It therefore waived the provision with reference to the election of directors and cannot now insist that it was a condition precedent to appellee's right of recovery. A further answer to this proposition is that this defense was not set forth in the affidavit of merits.

It is also insisted that said agreement "is illegal, void, unenforceable and against public policy." The principal ground urged in support of this contention is that the contract entered into practically amounted to a dissolution of appellee corporation. A reading of said proposition and acceptance clearly discloses that this was not intended. It was specifically provided that appellee corporation should continue its corporate existence.

In this connection, it is insisted that a corporation can not sell all of its business and retire therefrom in the absence of express authorization, presumably meaning authorization from the state. This is a question to be raised by the state. An individual or corporation who has entered into a contract, which has been executed, cannot question the legality of said contract while it retains the benefit thereof. The record discloses this to be the situation of appellant.

It is also insisted that said contract is ultra vires. No plea of ultra vires was filed. This, under the holding in Chicago Pneumatic Tool Co. v. Munsell, 107 App. 344-345, is necessary. Citing 5 Encyc. of Pl. & Pr., 96; Lake Street Electric Ry. Co. v. Carmichael, 184 Ill. 343-351. Without reference, however, to the failure to file such special plea, the evidence is not sufficient to support a plea of that character.

Lastly, it is contended that the judgment is contrary to the

law and the evidence. What we have already said disposes of this contention.

As no substantial error was committed by the court, the judgment will be affirmed.

Judgement affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

*abstract
Quincy
Adams County
April 12, 1928*

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253

253 I A. 628²

General No. 8174

Agenda No. 39

OCTOBER TERM A. D. 1927

Dick and Brothers Quincy Brewing Co., Appellee,

vs.

City of Quincy, Appellant.

Appeal from Circuit Court, Adams County.

ELDRIDGE, J.

In 1894 the City of Quincy passed an improvement ordinance for the paving of certain portions of Broadway street. Appellee at that time owned lot 4 except the south 49½ feet thereof, in block 1, which abutted for a distance of 82½ feet on the south side of said street. On this lot was an old dwelling, and a brick building used for a saloon, twenty feet wide and forty-five feet deep, and a small one story building which was used for storage. There was also a smoke house, coal shed, toilet and barn located on the rear of the lot. Prior to the improvement there had been no ordinance of the City of Quincy establishing any grade on this part of Broadway street. It was little more than a country road. Access to the premises from the roadway was made through a private alley or driveway. The street slopes perceptibly from east to west. There was a hump or elevation on the south side of the street which caused the water to flow to the north side of the street in rainy weather. The sidewalk extended

east and west in front of the property, which the evidence tends to show was elevated above the roadway from six to ten inches and that where the alley or driveway crossed the sidewalk entering the street it was eight or ten inches above the traveled portion of the street. In making the improvement it was necessary to excavate the street in front of these premises. There is quite a variance in the testimony as to just what depth this excavation was made. The witness, Futterer, who testified on behalf of appellee and who has been referred to by counsel therefor, as one entitled to particular consideration from the fact that he lived on the adjoining lot, testified that before the improvement was made the elevation between this driveway and the traveled portion of the street, was about eight or ten inches and that after the improvement was made the elevation was from twenty to twenty-four inches. In other words, that the improvement had lowered the grade of the street in front of the driveway or alley between twelve and fourteen inches. The improvement did not interfere with the sidewalk previously existing and the only contention is that the market value of the property has been depreciated because ingress and egress thereto from the roadway by means of the alley or driveway have been made less accessible. The evidence for appellee further tends to show that the fair market

value of the premises before the improvement was between forty-five hundred and six thousand dollars. The evidence for appellant in regard thereto placed the figures at between twenty-five hundred and forty-five hundred dollars. Some of the witnesses for appellee place the difference between the market value of the property before and after the improvement at as high a figure as \$3000.00, while the evidence of the witnesses for appellant tends to prove that the market value of the property instead of being diminished by reason of the improvement, has been enhanced. The witness, August R. Dick, president of the Brewing Company, testified that at the present time after the improvement has been completed, the driveway or alley is being used for ingress and egress to the premises. The evidence for appellant tends to show that at an expense of \$75.00 or \$100.00, the driveway or alley could be made as accessible as it was before the improvement and there is no evidence to contradict this. The jury rendered a verdict assessing the damages at \$900.00, for which sum judgment was rendered.

The first error complained of is the sustaining of a demurrer filed by appellee to the third and fourth pleas of appellant. These pleas set up the assessment proceedings of the city council providing for the improvement and are in the nature of an estoppel

for the reason that in the assessment proceedings appellee had an opportunity on the hearing of benefits, to have any damages, which he claimed by reason of the improvement, determined, but that it failed to file any objections thereto and cannot now be heard to say that he suffered any damages by reason of the improvement. This question has been decided adversely to appellant's contention. **Village of Grant Park vs. Troh**, 218 Ill. 516; **Botsford vs. City of Elgin**, 213 Ill. 599.

It is also urged that before appellee could recover he had to prove that there had been a change in a grade already established. This proposition has also been settled otherwise. **Chapman vs. City of Staunton**, 246 Ill. 394; **City of Bloomington**, 141 Ill. 346. Appellee has also assigned several cross errors. It offered in evidence a tax notice of the special assessment against the premises in question for the sum of \$540.78. It also offered its check for that sum showing that the assessment had been paid and also a receipt therefor, signed by the city treasurer. Objections were sustained to the admission of these exhibits. They were not material to any of the issues in the case and for that reason the objections were properly sustained. Appellee also requested the court that the jury be ordered to view the premises claimed to be

damaged, in company with the sheriff. In cases of this character the right to have the jury view the premises sought to be damaged, lies in the discretion of the court and is generally allowed where, in the nature of the case, it becomes important for the jury to view the premises in order to understand the physical situation and properly apply the evidence thereto. **Vane vs. Evanston**, 150 Ill. 616; **Hagan vs Union El. R. R. Co.**, 258 Ill. 352; **Rich vs. Chicago**, 187 Ill. 396; **Springer vs. Chicago**, 135 Ill. 552. **Osgood vs. Chicago**, 154 Ill. 194; **Humphreys & Co. vs. Bloomington**, Ill. App. In the present case we think the court might well have granted the request.

The judgment in this case must be reversed, however, on the ground that the damages assessed are grossly excessive. The only damages to the property claimed is the lowering of the grade not exceeding fourteen inches, where the driveway enters the roadway of the street. While some of the witnesses for appellee, as we understand their evidence from the abstract, estimate that the depth of the excavation made in the improvement makes a drop of from three to four feet between the surface of the paving and the driveway, yet others testified that the distance between the junction of the driveway and the street had not been lowered by the improvement more than twelve

or fourteen inches. The uncontradicted evidence introduced by appellant show that the driveway could be made as practical as it was before the improvement was made, at an expense not to exceed one hundred dollars. The jury, not having viewed the premises and not knowing anything about the conditions as they actually existed, except such impressions they could gather from the conflicting statements of the witnesses, were in no better position to determine what the actual conditions are since the improvement was made, than we are. From the evidence appearing in this record the damages are excessive and for that reason the judgment is reversed.

Judgment Reversed.

abstract
 Union Filed
 July 2, 1928
 Rehearing denied
 October 11, 1928

22 H
 253 I.A. 628³

General No. 8237

Agenda No. 30

APRIL TERM, A. D. 1928

J. E. Hogan and L. W. Reese, partners doing business under the firm name of Hogan &

Reese, Appellees,

vs.

Henry Ermovik, Appellant.

Appeal from the Circuit Court of Christian County
 PER CURIAM.

This is an appeal from an order and judgment of the Circuit Court of Christian County, refusing to vacate a judgment entered by default and grant appellant leave to plead and defend the suit. Appellees brought their suit against appellant to the November Term, A. D. 1927, of said court, which convened on November 28, 1927. The suit is brought to recover for services claimed to have been performed by appellees for appellant of the reasonable value of twenty-five hundred dollars, and is based upon the following account:

| | | |
|--|-----------|-----------|
| Dec. 1, 1924, to retainer and legal services Pana Natl. Bank v. H. Ermovick.... | \$ 300.00 | |
| Jan. 10, 1925, to retainer and legal services, Chancery case of Henry Ermovik v. Petronella Korkoskie, et al | 1000.00 | |
| April 1, 1925, to retainer and legal services in suit on note of E. N. White, Admr. v. Henry Ermovik..... | 1000.00 | |
| March 20, 1925, to retainer and legal services case of People v. Henry Ermovik.... | 500.00 | |
| June 1925, to expenses trip to Hot Springs, Arkansas, to take deposition in case of E. L. White v. Henry Ermovik | 100.00 | |
| March 1, 1925, to legal services in matter of the estate of John Korkoskie, Decsd... | 100.00 | |
| May 1, 1925, by cash on account | \$500.00 | |
| | \$500.00 | \$3000.00 |
| | | \$500.00 |
| Balance due | | \$2500.00 |

There was an affidavit of claim attached to the declaration and account.

Under the rules of court, offered in evidence, it was shown that Tuesday, the second day of the term, was default day, and that the court opened at eight-thirty in the morning of each day. The rules provided that if the name of counsel for defendant appears upon the Judge's docket, the notice that such a default is about to be taken shall be given such counsel before entering the default; and that all motions shall be made in open court from a conspicuous place and audible voice, and motion, with reasons, reduced to writing, filed with the clerk one day before the same will be heard, unless otherwise ordered by the court.

It is shown that Leslie J. Taylor, a practicing attorney of Christian County, appeared in court in behalf of appellant in said cause, at eight thirty-three of the morning of Tuesday, November 29, 1927, and the record recites that at that time the court had made the following entry in said cause upon the record:

"There being no plea on file and it appearing to the court that due personal service of process of summons issued in said cause, has been had on defendant Henry Ermovik for at least ten days before the first day of this term, and he being now here three times solemnly called in open court, comes not, nor does any person for him, but herein makes default;"

Whereupon, at this point, the appellant, through his said attorney entered his appearance and his motion to set aside the default and for leave to plead. Under the rules of court said motion was reduced to writing and affidavits were submitted showing that appellant had prior to the 28th day of November, 1927, consulted with an attorney, one Henry Miller, to advise him as to said cause; that appellant resided at Pana, about twenty miles distant from said court and that on the evening of November 28, 1927, at eight thirty, said attorney Miller

by telephone notified appellant that he could not appear for him in said court at Taylorville, and advised appellant to attend the court in the morning of the 29th and employ some attorney to represent him and prevent a default. The proofs show that appellant arrived at Taylor's office at about eight o'clock in the morning and found no one there; that he then went to the court and found no one there and returned to said Taylor's office at eight twenty-five in the morning and found Taylor, and Taylor's affidavit states that he, Taylor, appeared in court at eight thirty-five and made said motion.

The affidavits state generally that appellant has a meretorious defense to said action, and that the defendant heretofore paid the plaintiffs the sum of five hundred dollars, which he believed was the entire fees to be paid, except a contingent fee to be paid in the event of a successful prosecution of a bill for accounting, in which the plaintiffs, with Attorney Springstun, were representing the defendant; that, if given an opportunity to defend, he will be able to present evidence to the court in support of his contention that he is not now and was not at the time of the beginning of the suit, indebted to the plaintiffs, or either of them.

On January 21, 1928, and during the November term, said motion was heard by the court and denied and judgment entered upon the affidavit of claims Appellant excepted and at the same time moved to set aside the judgment and for leave to file additional affidavits. The additional affidavits presented and the motion to vacate show that on April 14, 1927, appellant received a letter and statement of account by mail from appellees, which were attached to the affidavit, and that neither of the appellees have ever rendered any services for appellant since the date of said letter and statement of account, except the drafting of a short stipulation, and that the services sued for in this proceeding are identically the same services set forth in the statement of

account.

The additional affidavits presented and the motion to vacate show that appellees were associated with Attorney Charles E. Springstun in a part of the matters upon which said claim was based, and that the whole matter involved only a few days' time.

On April 12, 1927, appellees rendered to appellant the following statement of account:

| | |
|--|-----------------|
| To balance on contract for services in all court matters | \$500.00 |
| To expenses and fee trip to Hot Springs, Arkansas | 102.85 |
| To amt. paid R. R. Parrish for testimony | 1.50 |
| Total amount due | <u>\$604.35</u> |

which was accompanied by a letter written by one of the appellees in the following form:

"As I advised you when there last week, I was of the opinion your case would be settled on the terms indicated. Mr. White, however, called me up next day and said that he and Preihs had recommended to Mrs. Korkoskie that she settle and she was to let him know in a day or two, and then he would phone me, but I have heard nothing further from him. Indirectly I have learned that the trouble seemed to be difficulty in Mrs. Korkoskie raising her part of the money, as I guess she was already rather heavily involved, and no one seems to care for the loan, so it may be that the settlement will fall through with and we will be required to proceed with the cases, which I hope to do soon as it is necessary.

"In view of this condition, however, I am of the opinion that you should take care of the fees already due with the exception of concluding the argument in both these cases, and then if we succeed in winning, the contingent fee can be taken care of later.

"I do not care to go ahead and close up this matter until you have either paid these fees or secured them in some manner,

because if a judgment is obtained against you, your property will all be involved so that the balance of this fee would be uncollectible. Therefore I am enclosing a bill herewith, which includes the balance of \$500 as per our agreement which I had acceded to on your statement, and the expenses and services for the trip to Hot Springs, Arkansas, which of course was not anticipated at the time the contract was made

"There has been a vast amount of time taken and work done in connection with these various litigations, which includes one suit tried in circuit court which we won, the examination into the attention to various matters in county court with reference to the estate. Attention in court and hearing which took days and weeks in the accounting case referred to the master in chancery, a trial in the circuit court on the twenty thousand dollar note, and attention given to the criminal case. If you expect these matters to be concluded and determined you must take care of this bill and should also arrange your fee matters with Mr. Springstun.

"I assume they will let us know definitely in a day or two, and will be ready to move, so it is important this matter be given your immediate attention. I am sending copy of this letter to Mr. Springstun with request he take the matter up with you and close this feature of it up, and this should be done independent of whether settled or not.

"I am also advised that you have not yet paid Parrish, and I don't understand this. These matters are cash, and unless you pay, I will be compelled to as I stood good for them, so kindly remit to him the balance and advise me you have done so.

"I do not like to be critical, but still it seems to me that you could not expect much extension of time of costs in your statements of agreements, from the attitude you take at times."

It was shown by the affidavits that appellant had paid appellees

five hundred dollars, which same amount is credited upon appellees' bill under date of May 1, 1925. Appellant further stated that he had paid Springstun the sum of two hundred dollars.

This motion to vacate the judgment was heard on February 6, 1928, and denied, and appellant has appealed.

It appears in this cause from the record that no order of default or judgment was entered prior to January 21, 1928, and that while the appearance of appellant was entered upon the judge's docket on November 29, 1927, appellant's motion for leave to plead was passed upon and judgment entered on January 21, 1928, without any notice having been given to appellant. This was contrary to the rules of court, and while this, under the state of the record, does not constitute reversible error, it does account for some of the delay during the same term. It might be said that appellant in the proofs presented, showed a reasonable excuse for not appearing in said court until five minutes after the opening of court on default day, although it does not appear that appellant ever employed any attorney to defend said suit prior to the default. Appellant had merely advised with Attorney Miller, and said attorney had attempted to make negotiations with Appellee Hogan, which had failed. The fundamental difficulty with appellant's appeal is that he does not show that he has a defense to the merits of the suit. Appellant states that he paid appellees the sum of five hundred dollars which "he believed was the entire fees to be paid, except a contingent fee to be paid in the event of a successful prosecution of a bill for accounting in which the plaintiffs, with Attorney Springstun, were representing the defendant."

Appellant further shows that there was a contract and understanding with appellees as to fees by producing appellee's letter of April 12, 1927, which shows there was a contract for services and an arrangement as to a contingent fee made long prior

to the date of the letter. It appears that after the date of the letter appellees had drawn a stipulation for appellant. Appellant in his proof does not give the terms of the contract or the amount, nature or terms of the contingent fee. For anything that appears in the affidavit and proofs, the "contingent fee" had been earned and accrued after April 12, 1927, and the date of the commencement of the action. Doubtless the entire litigation had been composed and the fees earned prior to the commencement of the suit, or appellant would have negatived that fact in his affidavits. Appellant in his affidavits does not negative the performance of any service or its value, as set out in appellees' affidavit of claim. Appellant apparently relies entirely upon the statement sent him April 12, 1927, when he well knew that at that time there was a contingent fee—by contract—pending between himself and appellees, as well as another contract for services for which appellant has brought the proof into court. Appellant's proof as to the merits of the cause fix a status existing upon April 12, 1927, and the suit was not started until November 14, 1927.

While the courts have held that motions to vacate defaults should be construed equitably and liberally (*Mason v. McNamara, et al*, 57 Ill. 277; *City of Moline v. C. B. & Q. R. R. Co.*, 262 Ill. 65; and *McMurray v. Peabody Coal Co.*, 281 Ill. 226) the courts have also held that motions to set aside defaults are properly overruled where the affidavit fails to show a meritorious defense.

In *Gilchrist Trans. Co. v. North Grain Co.*, 204 Ill. 513; *The Citizens Savings Bank and Trust Co. et al, v. The City of Chicago*, 215 Ill. 174, it is held, and it is an elementary rule, that the affidavits must state facts making a **prima facie** case of a meritorious defense to the suit, and it is further held that the affidavits in support of such applications are to be construed most strongly against the party making the application.

(**Hallin v. Penney**, 209 Ill. App. 230; **Hildebrand v. Hildebrand**, 211 Ill. App. 624.)

Construing the affidavits in this cause under the rules laid down, we can not say that the trial court wrongfully and oppressively exercised its discretion in refusing to vacate said judgment.

Appellant has further assigned error on the ground that regardless of the default appellant upon appearance was entitled to notice of the assessing of damages, citing **Williams v. Norton**, 135 Ill. App. 114, and **American Mail Order House v. Marsh**, 118 Ill. App. 248. In neither of the cases cited was there an affidavit of claim. The affidavit of claim obviated the necessity of an inquest of damages. (**New York Exchange Bank v. Reed**, 232 Ill. 125; **Beckus v. The City of Kankakee**, 213 Ill. App. 545.)

Finding no error in the judgment of the Circuit Court of Christian County, it is affirmed.

Affirmed.

Excerpt
Union T. Laid
October 15, 1928
The morning of
January 4, 1929

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General No. 8235

Agenda No. 28

Lanetta L. Danford, Administratrix of the Estate of
M. L. Danford, deceased, for use of D. L.
Dunbar, Sheriff, Appellee.

vs.

W. H. Watkins, Troy L. Long and Wm. A. Watkins,
Appellants.

Appeal from Christian.

NIEHAUS, P.J.

In this case an appeal is prosecuted from a judgment rendered in the circuit court of Christian county in an action of debt brought against the appellant, W. H. Watkins as principal, and Troy L. Long and William A. Watkins as sureties, on a replevin bond. There was a trial by the court; and the court found the issues in favor of the plaintiff, and rendered a judgment for \$4500.00 debt; to be discharged upon payment of \$600.00 damages and costs of suit. The sum of \$600.00 damages was allowed for attorney's fees which were incurred by the defendant in the replevin suit. The replevin bond which is the basis of this suit had been given by the appellants to M. L. Danford, coroner of Christian county in the replevin suit mentioned, and entitled W. H. Watkins, v. D. L. Dunbar, sheriff of Christian county. The suit was commenced by the appellant W. H. Watkins against the sheriff because of a levy made by the sheriff under an execution issued to him on the judgment which amounted to the sum of \$2784.90; and which had been recovered by

the Mt. Auburn State Bank. The levy made was upon the personal property of the judgment debtor, the appellant's son Grover C. Watkins. The value of the personal property levied upon was fixed at \$2250.00. The appellant W. H. Watkins, claimed to have a lien upon the personal property of the judgment debtor which had been levied upon under a chattel mortgage executed by the son covering the property levied upon and the validity of the mortgage lien was the matter in issue in the trial of the case in the circuit court of Christian county. The trial resulted in a verdict and judgment in favor of the validity of the chattel mortgage lien; but on appeal, this court found that the chattel mortgage was invalid; and had created no lien against the property and therefore sustained the lien acquired by the levy of the execution upon the property. This court reversed the judgment; and the cause was not remanded. **Watkins v. Dunbar** 232 Ill. App. 12.

The replevin bond in question contains the following conditions applicable to the questions here involved:

"Now if the said W. H. Watkins, plaintiff, shall prosecute his suit to effect and without delay, and make return of said property, if return thereof shall be awarded, and save and keep harmless the said sheriff in replevying said property, and moreover shall pay all costs and damages occasioned by wrongfully suing out said writ of replevin, then this obligation to be void, otherwise to remain in full force and effect."

Under the findings of fact which were incorporated in and made a

part of the judgment of this court, the judgment of this court is a final adjudication upon the question involved in the replevin suit, namely, whether the replevin writ was wrongfully sued out or not, and fixes the fact, that the suing out of the writ was wrongful. Under the conditions of the bond referred to the appellants as principal and the sureties became liable for attorney's fees incurred by the defendant in the replevin suit which were a part of the damages resulting to him by the wrongful suing out of the writ. **Moore v. Paul F. Beech Co.** 221 Ill. 609; **Siegel v. Hanchett** 33 Ill. App. 634.

It is insisted by the appellants, that no recovery for attorney's fees can be had because the final judgment in this case does not contain an order for return of the property; and to sustain this position, **Vinyard v. Barnest** 124 Ill. 346 is cited. But it will be noticed on examination of the case cited, that it is not in point on the question of the right to recover attorney's fees in a suit on a replevin bond given in a suit which is not prosecuted to effect, where the conditions are the same as in the bond in question. The only matter decided in the Vinyard case pertains to the right of recovery of the value of the property replevined where there is no order of **retorno habendo**; and this is pointed out in the opinion where the court says: "The question

is presented by the ruling below, whether under a replevin bond, conditioned that 'the plaintiffs shall prosecute their suit to effect and without delay, and make return of said property if return thereof shall be awarded,' there can be a recovery of the property replevied, without proof of a judgment awarding its return." The matter of recovery for the value of the personal property wrongfully replevined, which was a controverted matter in the trial court, is not involved in this appeal. As stated in appellant's brief, the only matter involved in this appeal is the legal propriety of the judgment against the appellant for the allowance of the \$600.00 attorney's fees, as damages.

It is also contended by the appellants for reversal of the judgment that sheriff Dunbar, the defendant in the replevin suit, did not incur any liability on account of attorney's fees in the replevin case; and did not suffer any actual damages. But the record discloses definitely, that the attorneys who represented him in the case and for whose services the fees were recovered, rendered the services for Dunbar and at his request. Under these circumstances Dunbar became legally obligated to pay the fees of the attorneys for their services in defense of the replevin suit and a legal liability was incurred.

"Where a liability to pay is established, that is suf-

ficient without showing an actual payment.” **Siegel v. Hanchett, supra.**

For the reasons stated, we find no error in the rendition of the judgment and it is therefore affirmed.
Judgment affirmed.

Abstract
Original copy
file 29-1926
abstract sent
to County Clerk
file 29-1926
Transcript
file 29-1926
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253 I.A. 629

General No. 7945

Agenda No. 24

APRIL TERM, A. D. 1926

Southern Surety Company, Appellant.

vs.

The Peoples State Bank of Astoria, Appellee

Appeal from the county court of Fulton County

Per Curiam.

In this case an appeal to this court was perfected by the Southern Surety Company from a judgment rendered in the county court of Fulton County on a trial of the rights of property involved in this case, which judgment adjudicated the right to the property in question to be in The Peoples State Bank of Astoria; and this court affirmed the judgment of the lower court. Thereafter the Supreme Court granted a writ of *certiorari* and reviewed the judgment of affirmance and reversed it, but remanded the cause to this court with directions to make a finding of fact concerning the possession of the property involved in the controversy. *Southern Surety Company v. Peoples State Bank* 332 Ill. 362.

We find that the evidence in the record shows conclusively that the Southern Surety Company took possession of the property referred to under the written assignment and transfer of the property to it, on October 2, 1924; and that it had actual possession thereof before March 4, 1925, the date of the recovery of the judgment by the Peoples State Bank of Astoria, upon which judgment the execution levied upon the property in question was issued; and that the right to the property involved and the possession of the same was in the Southern Surety Company at the time the execution referred to was levied; and that the Peoples State Bank of Astoria acquired no rights in or to the property by the levy of the execution.

For the reasons stated under the mandate of the Supreme Court, the judgment of the county court of Fulton county is reversed.

Findings of Fact to be incorporated in the Judgment.

We find that the appellant, Southern Surety Company, had actual possession of the property involved in this case under its chattel mortgage before the recovery of the judgment by The Peoples State Bank of Astoria against Nixon & Keeley and the levy of the execution issued thereupon.

La H

250 I.A. 629²

General No. 8238

Agenda No. 4

Stella Lawrence, Appellee.

vs.

Charles J. Swift and Carrie F. Swift, Appellants.

Appeal from Sangamon.

NIEHAUS, P.J.

In this case the appellee, Stella Lawrence, filed a bill in equity against the appellants, Charles J. Swift and Carrie F. Swift, in the circuit court of Sangamon county, for an accounting and dissolution of co-partnership, which it is averred in the bill, was entered into by the parties with reference to the purchase of a farm of 160 acres in Sangamon county, and farming the same. The appellants filed an answer, denying the allegations of the bill in reference to the partnership matters; and the right to an accounting as prayed for in the bill. The case was referred to the Master in Chancery, who heard the evidence, and made his findings concerning the partnership matters and the right of the appellee to an accounting. The appellants filed exceptions to the Master's report, and these exceptions upon the hearing of the case were overruled by the court; and a decree was entered, finding that the allegations of appellee's bill are substantially true as therein stated; and that she is entitled to an accounting; and that

the appellants are liable to account jointly and severally to the appellee concerning the conduct of their co-partnership business; and concerning matters pertaining to the purchase of the farm property; that the appellant Carrie F. Swift is indebted to the complainant in the sum of \$1776.00, being one half the difference of the value of the improvements on the land purchased by them jointly and divided between them; and that the appellants are jointly and severally indebted to the appellee in the sum of \$693.87, on account of their farming operations. An appeal is prosecuted from this decree.

It appears from the evidence that the 160 acre farm in question had been owned by Iber Cannon Burns, deceased, the father of the appellee Stella Lawrence and the appellant Carrie F. Swift; and became a part of the estate of the deceased father; that this farm was to be sold at public auction in October 1924. And the appellee testified, concerning an agreement by the parties with reference to the purchase of the farm and the operation of the same in co-partnership, as follows:

"We bought the place and moved there to operate the place together. Mrs. Swift is my sister. Father died and left money to us, and we thought to buy the place and put the money in it and live together. *** We were to go fifty fifty when we bought the place. It was to be sold and bid in and then we divided it. It was sold at public auction in October 1924. *** My understanding with Mr. and Mrs. Swift was that we were to buy the place and then divide it. *** Mr. Herbert Rohrer, a banker in Waverly, bid the place in at the sale. Mr. Swift had him bid it in.

The understanding between Mr. and Mrs. Swift and myself about buying the place was that we could buy the place and pay for it without any trouble. Mr. Rohrer bid it in on instructions from Mr. and Mrs. Swift and myself. Mr. Rohrer bid in the whole 160 and deeds were made but that wasn't made a complete settlement then not until in April. We later agreed on the division of the land, as my sister decided her child would be more apt to live on her 80 and mine would not, because I had two, and she would be better off to have the improvements and me without, because mine would sell and she said she was willing to pay the difference in the land. Mrs. Swift was furnishing the money for her part of our father's estate. Yes sir, this 160 was all one tract. The improvements were all on the southwest 40—all on one 40. Yes, she wanted the 40 with the improvements on it, said her child would be more apt to live on hers than mine would on mine. I agreed she should have the 40 with the improvements on it, she to pay the difference. *** I could have either 40, either the east 40 or the north 40, and I said it would be best to have the east 80, and I took the east half and she the west half. This agreement was satisfactory to her. *** We divided them before the deeds were made. Her deed was made in her name and my deed was made in my name, made by the Master in Chancery. Our agreement of operation of the place was, we should go on the place and split fifty fifty, and each one work. This agreement was made when we bought the place. Charles Swift was living on the place when I bought it. I moved there afterwards. *** Mr. and Mrs. Swift and their daughter and me and my two daughters were present when the agreement was made. *** Mr. Swift said he would run the farm and go fifty fifty on everything. I said it would be all right to run it fifty fifty if it was run right. I was living in Waverly at the time. I moved to the farm in pursuance of that agreement. I moved to the farm in December after the agreement was made. *** I moved on the place and stayed there until the next April, a year. *** Mr. Swift, his wife and I and the girls did the work on the farm, while I was there. We just went ahead and farmed the place, and Mr. Swift paid the expenses and sold the stuff and handled all the money. He did not keep any books that I know of. When he would sell the stuff he kept the money. I never got any. He sold the produce, or corn. He never paid me anything in any division, or pay me any expenses. I contributed to my part of the expense of buying flour and sugar. He sold the stuff that I had brought to the place, which consisted of chickens and my hogs that were there. He killed two sows that I brought there. His family and my family continued to live there together from December until the next April, a year. I asked for an accounting or an explanation of money coming in, and expenses during that time, but he never gave me any. He did not give me any reason for not accounting for the money, or expenses or profits. Crops were sold off the place during that time by Mr. Swift, he collected the money. He accounted to me for the wheat. The elevator divided the wheat money. I gave orders to the elevator for them to hold my money and they held my part of the wheat money. He never accounted for anything else that was sold. I asked him and he said, well, if we could not get along we better do something.

I could pick my arbitrator and he would pick his. I picked my man, and he picked his. I picked Mr. Linkenhoker, and he picked W. E. Alderson on the 24th of April 1926. I called them together in the presence of Frances Lawrence, Opal Lawrence, Mary Swift, Mr. Swift, and Mrs. Swift, at Mr. Swift's home. Two arbitrators were there. Mr. Swift and I told them what we wanted done. Mr. Swift told them we wanted a division made of the land and we wanted the personal dividend that was not already divided. They were to find out the difference and Mr. Swift was to pay it. *** This proceeding was kind of friendly. They did not call in any third arbitrator, the two agreed and made it satisfactory. They asked us if we agreed to their findings, and both parties agreed. *** They proceeded with the arbitration and made a report which was submitted to me and to Mr. and Mrs. Swift. It was satisfactory. That day Swift said it was satisfactory or seemed to be. I asked Mr. Swift how it was going to be paid and he said, Stella, I will pay spot cash. The arbitrators were there and heard that. He said they wanted all to be satisfied, because he did not want it to be said he had to take it to court with a widow lady. I asked him for the amount, but he never paid it, nor the arbitrators' award, and he has never made any division from the income from the place. I later moved away on the 29th of April 1926."

Concerning the accounting and settlement arrived at by the friendly arbitration referred to, **Mr. Linkenhoker** testified:

"Mr. Alderson and I met at Mr. Swift's house about April 24th 1926. Mr. and Mrs. Swift and Mrs. Lawrence and their two daughters, Mr. Swift's little daughter, were there. We asked them if they were willing to abide by our decision in case we agreed, and they said they were. The proceedings were of a friendly nature at that time. They asked us as arbitrators to divide the stock and grain and the land. The difference in the two 80s of land. The one 80 had the buildings on, and the other 80 had none. We were to value it so much and divide it equally between the two, fifty fifty. Everything was included in that, stock, grain and a little hay. **** We agreed about what should be taken into consideration. They listed this stock and grain and stuff that should be divided, and told us what was there and where it was, and so on, and went with us and showed us. *** I got my information from both of them. They were both present. Neither of them objected to anything going in for consideration that was given to me. After I got all our figures and all our items together, Mr. Alderson and myself went into an agreement with ourselves and we proceeded to divide the stuff. Placed a valuation on everything, and divided it best we knew how. We agreed about a division, and notified them of the agreement we had made. We wrote out three copies. Gave one to Mr. Swift, one to Mrs. Lawrence and I have one myself.

*** This agreement was signed by Mr. Alderson and myself. We reached a conclusion as to what was the difference in value of the real estate. That difference was \$3552.00. We wrote down what our findings were. Mr. Alderson and myself signed it, and Mr. Alderson read it to them. And they said it was all right. Mrs. Lawrence asked Mr. Swift how he was going to pay her this money, and he said, 'I will have the money for you, Stella.' He didn't raise any objection to the account, as I heard. *** At the time of the arbitration agreement, Mr. and Mrs. Smith were present, they could hear everything that was said and done. They agreed to whatever was done."

Mr. Linkenhoker also testified that the total amount which the arbitrators found to be due the appellee was \$2469.87, which is the same total found to be due her in the decree.

W. E. Alderson, the other arbitrator selected by the appellants corroborates Mr. Linkenhoker in every particular concerning the manner in which the settlement between the parties was arrived at by means of the friendly arbitration referred to.

The appellants, as witnesses before the Master gave their version of the agreement entered into between the parties, both with reference to a division of the land after the purchase of the same, and about the terms under which the farming operations on the land after it was divided were carried on; and the version of the appellants is substantially different from the agreement, as testified to by the appellee; but the evidence in the record apparently corroborates the appellee; both as to the terms of the

co-partnership agreement; and as to her right under the agreement for the division of the land jointly purchased, to the one half of the value of the improvements on the 80 acre tract deeded to the appellant Carrie F. Swift under the agreement mentioned; and also as to her right to one half of the profits which resulted from the operation of the farm.

It is insisted by the appellants that the agreement concerning the division of the land purchased is void because it is in conflict with the Statute of Frauds. In reference to this contention, it is pointed out, that this proceeding is not an action brought to charge the appellants upon a contract for the sale of lands 'or any interest in the same;' but upon an agreement for a division or partition of lands jointly purchased by the appellee and appellants for the purposes of a co-partnership; and the division and partition has been carried into effect.

It is contended also that it was error to admit the report made by the arbitrators in evidence. This report was admissible however, because it was made by agreement of the appellee and the appellants; and the evidence shows that they admitted the report to be a true and correct adjustment and settlement of their financial differences. It was not an

arbitration provided for by Statute, and has no legal force as such; but it was a method agreed upon by the parties for the adjustment of their differences, and all the parties interested recognized it as a true just and proper statement of the account between them.

The findings in the decree with reference to the accounting and the amounts due the appellee from the appellants jointly and severally are sustained by a clear preponderance of the evidence in the record. The decree is therefore affirmed.

Decree affirmed.

General No. 8251

Agenda No. 13

OCTOBER TERM, A. D. 1928

Jesse R. Smith, Appellee.

vs.

Village of Ripley, Appellant.

Appeal from Brown

NIEHAUS, PJ.

In this case a petition for mandamus was filed by the appellee Jesse R. Smith against the appellant, Village of Ripley, in the circuit court of Brown county, praying that a writ of mandamus issue, directed to the Village of Ripley and its officers to pay appellee the sum of \$200.00, the price agreed upon to be paid to him by the Village of Ripley for the conveyance of a strip of land to the Village to be used for the purpose of laying out and opening a public street of the Village, known as Eleanor Avenue.

The appellant filed a general and special demurrer to the petition, which was overruled by the court; the appellant abided by its demurrer; and thereupon the court rendered judgment, awarding the writ prayed for in the petition. This appeal is prosecuted from the order of the court overruling the demurrer and awarding the writ.

It is contended by the appellant that the demurrer should have been sustained upon the special grounds set forth

in the demurrer which are as follows:

(A) The contract sought to be enforced was for the sale of relator's land requiring the consideration money to be paid from the village treasury of said village and was made while the relator was an officer of the village of Rindley.

(B) The contract and the resolutions passed and adopted by the Board of Trustees of said village were made, passed and adopted in violation of section seven (7), Article six (6) of Chapter 24 of the Revised Statutes of the State of Illinois.

It is true as contended that Section 7 of Article 6 of Chapter 24 referred to, provides: "No officer shall be directly or indirectly interested in any contract, work or business of the city, or the sale of any article, the expense, price or consideration of which is paid from the treasury, or by any assessment levied by any act or ordinance; nor in the purchase of any real estate or other property belonging to the corporation, or which shall be sold for taxes or assessments, or by virtue of legal process at the suit of said corporation." And the point made by appellant concerning the legality of the transaction, by which the appellee's land was acquired by the Village, for the purpose of laying out and opening the public street or avenue of the Village referred to is that the appellee at the time of the transaction was an officer of the Village and therefor illegal. It is sufficient however to say concerning this contention that no such inference can be properly drawn from the averments of the petition in that regard. The averments in the petition concerning the transaction referred to

which was concluded at a meeting of the Village Trustees held September 3, 1923 between the Village and the appellee and by which the appellee conveyed his land to the Village for the purposes referred to, are as follows:

Your Petitioner further shows that a regular meeting of the said President and the said Board of Trustees, at which meeting the President and all members of said Board were present, of the said Village of Ripley, held September 3, 1923, motion was made and duly seconded that the Village of Ripley pay to your petitioner the sum of \$200.00 for the lands of your petitioner, used for laying out, establishing and opening said Avenue and that your petitioner be urged to convey said lands forthwith for the laying out, establishing and opening of said Avenue, which motion, on the call of the roll for yea and nay vote was adopted and passed by five members voting in the affirmative and one against, and was declared passed and adopted by the said President.

And your petitioner further shows that on September 12, 1923, in consequence of the action of said President and members of said Board of Trustees of the said Village of Ripley agreeing to pay your petitioner the sum of \$200.00 for said lands of your petitioner used in laying out, establishing and opening of said road, your petitioner duly executed a deed to the same, as required by said President and said Trustees of said Village.

This being the only contention in the case, we conclude that the court properly overruled the demurrer and awarded the writ. Judgment is therefore affirmed.

Judgment affirmed.

General No. 8255

Agenda No. 16

OCTOBER TERM, A. D. 1928

Baptist Hardy, Executor of the last will and testament
of Zuleika Hardy, Deceased, et al. Appellants.

vs.

Clement V. Hardy, et al, Appellees.

Appeal from Hancock

NIEHAUS, PJ.

Zuleika Hardy, late of Hancock County, Illinois, died testate August 7, 1922, leaving surviving her no child nor children nor descendants thereof; and no father or mother; but left as her sole and only heirs at law, her brothers and sisters; and the children of two deceased sisters. Her brothers are Clement V. Hardy, Thomas Hardy, Joseph Hardy and Baptist Hardy; and her sisters are Sarah E. Hopkins, Emma F. Fife; and the children of her deceased sister Della Jenkins, are Ora Jenkins, Hazel Wright and Kenneth Jenkins; and the children of her deceased sister Mary J. Scott, are Leo Scott, Harold H. Scott and Rollo Scott.

The will of Zuleika Hardy which was admitted to probate on October 2, 1922, in the county court of Hancock county, is as follows:

I, Zuleika Hardy, of the county of Hancock and State of Illinois, being of sound mind and memory and appreciating the uncertainty of life and being desirous of making disposition of all of my property and estate in the event of my death, I hereby make, publish and declare this to be my last will and

testament, in manner following, that is to say:

First: I hereby direct the executor of this will to pay all of my just debts and funeral expenses as soon after my death as practicable out of my property and estate.

Second. In the event there has been no monument erected at the grave of my deceased sister, Louisa Hardy Platt, who was buried in or near Carlsbad, New Mexico, I authorize and direct the executor of this will to erect a monument at her grave to cost as near as practicable four hundred (\$400.00) Dollars, and pay for the same out of my estate.

Third. I authorize and direct the executor of this will to appropriate and use out of my estate four hundred (\$400.00) Dollars, in improving our family burial lot in the Harmony cemetery where my parents are buried and where I wish to be buried and in having appropriate letting on my behalf on our family monument.

Fourth. I give my bookcase and my books therein to Glona C. Hardy, daughter of my brother Joseph Hardy.

Fifth. I give my sewing machine to Mary Z. Hardy, daughter of my brother, Clement V. Hardy.

Sixth. I give my china closet to Zula M. Hardy, daughter of my brother, Baptist Hardy.

Seventh. I give to my sister Sarah E. Hopkins, one feather bed, the other of my two feather beds I give to my brother, Baptist Hardy and his family and request that the same together with the bedstead and bedding be left in his home for him and his family.

Eighth. I give to my sisters, Emma F. Fife and Sarah E. Hopkins, the remainder of my bed clothes, my clothing and keepsakes, to be divided between them and such of my other relatives as they may deem best.

Ninth. I hereby give, devise and bequeath to my brother, Baptist Hardy, in trust, the northeast quarter ($\frac{1}{4}$) of section nine (9), in township four (4) north, range six (6) west of the fourth principal meridian, in the county of Hancock and State of Illinois, and all other real estate that may be owned by me in Hancock County, Illinois, at the time of my death, for the following uses and purposes only, viz: The said Baptist Hardy shall sell the said real estate either at public sale or at private sale as he may deem best for the best interests of my estate and the persons interested therein and he is hereby given full power and authority to sell the same on such terms as he may deem to be for the best interests of my estate and the persons interested therein and he is given full power and authority to execute all necessary contracts, deeds and other instruments of writing necessary and proper to

pass title to the said real estate to the purchaser or purchasers thereof. After paying out of the proceeds of the said real estate the costs and expenses of sale and the expenses of the administration of my estate and my debts and the specific legacies hereinbefore provided for should my personal estate be insufficient for that purpose then he shall pay one-eighth of the remainder of said proceeds to my brother, Clement V. Hardy, one-eighth to my brother, Thomas Hardy, one-eighth to my brother, Joseph Hardy, one-eighth to my sister, Sarah E. Hopkins, one-eighth to my sister, Emma F. Fife and retain one-eighth for himself, Baptist Hardy. He shall pay one-twentyfourth to Ora Jenkins, one-twentyfourth to Hazel Wright and one-twentyfourth to Kenneth Jenkins, the three children of my deceased sister, Della Jenkins, one-twentyfourth to Leo Scott, one-twentyfourth to Harold H. Scott and one-twentyfourth to Rollo Scott, the three children of my deceased sister, Mary J. Scott.

In the event any of the said persons named are not living at the time of such distribution then their legal heirs shall receive and be paid the amount that would have been paid to such deceased if he or she had been living.

Tenth. I own the northwest quarter ($\frac{1}{4}$) of section nineteen (19) in township sixteen (16) south of range thirty-eight (38) east of the New Mexico Meridian, New Mexico. This land was originally in the large county of Eddy but this county as I understand it, was afterwards divided and that this land is now in what is known as Lea county. It may be that in order to realize what this land is reasonably worth, it may be necessary to hold it for some time. I therefore give, devise and bequeath said tract of land and also all other land, if any, owned by me in New Mexico at the time of my death, in trust, to my said brother Baptist Hardy, and I hereby give him full power and authority to hold the same until such time as he in his judgment may feel that it is wise to dispose of said property. He shall then sell the same either at public or private sale as to him shall seem best and on such terms as he may determine to be for the best and after paying all expenses of the sale and all taxes and other expenses thereon, he shall divide the proceeds equally between my brothers living and my sisters living at the time of such distribution, including the said Baptist Hardy, himself who shall take an equal share if living with my other brothers and sisters, then living.

Until my real estate in Hancock County, Illinois, is sold by my said brother Baptist Hardy, he shall have full power and authority to rent the same, collect the rents, pay the taxes and keep up the repairs. It is my wish that he sell my said lands in Hancock County, Illinois, within a reasonable time after my death but I do not want him to sacrifice the same in order to make a sale if conditions are not favorable he shall take all such reasonable time as he may deem necessary in order to secure for said land all it is reasonably worth.



Should I leave any other property at the time of my death not hereinbefore disposed of, I direct that the same be converted into money by the executor of this will and divided among my brothers and sisters and the children of my deceased sisters in the same proportion that I have above directed the proceeds from my land in Hancock county to be divided.

Eleventh. I hereby nominate and appoint my brother Baptist Hardy, executor of this my last will and testament and request that he be not required to give bond.

The appellant Baptist Hardy, named in the will as executor, was duly appointed and qualified as such; and he fully administered the estate and filed his final report which was approved. In this report he accounted for the personal property; also the rents from the real estate collected by him. Emma F. Fife, one of the sisters of the testatrix named in the ninth clause of the will, died testate Sept. 19, 1925; and she left surviving her husband John Fife; but no child or children or descendants thereof and no parent; but also left surviving her, her brothers and sisters, nephews and nieces named in the ninth clause of the will of the testatrix. By her will the deceased Emma F. Fife gave her husband, John Fife, a life estate in all of her property; and at his death the same was to be divided among her brothers and sisters and her nephews and nieces. John J. Schofield was duly appointed and is acting as executor of the last will of the deceased. The surviving husband, John Fife, renounced her will and refused to take there under on December 28, 1926, and before the period of distribution fixed in the ninth clause of the will of the testatrix; and

thereafter died intestate. His daughter Pearl Brown, who was a child of a former wife, was his only heir at law; and Fred Brown was duly appointed administrator of his estate. Afterwards Thomas Hardy, one of the brothers of the testatrix, on March 12, 1927, also died intestate; leaving no widow nor child nor descendants and no parent; but left as his only heirs, his surviving brothers and sisters; and the nephews and nieces named in the ninth clause of the will of the testatrix. Clement V. Hardy was duly appointed administrator of the estate of Thomas Hardy deceased. The real estate described in the tenth clause of the will of the testatrix was sold by Baptist Hardy in accordance with the provisions of her will, and on March 1, 1928 there was a balance of \$16000.00 of the proceeds of the sale of the land in the hands of Baptist Hardy as executor and trustee, which was duly distributed among the surviving brothers and sisters and nephews and nieces named in the ninth clause of the will of the testatrix as therein provided. The shares which would have gone to Emma F. Fife and Thomas Hardy respectively if living, were retained by the executor and trustee until a judicial construction could be had of the testatrix's will. And thereupon, Baptist Hardy individually and as executor and trustee of the will in question filed a bill in equity in the circuit court of Hancock county for a construction thereof. In construing the will,

the court found in its decree, that the devises to the brothers and sisters and nephews and nieces in the ninth clause of the will were vested interests; and had vested at the date of the death of the testatrix; and that therefore the share which had vested in Emma F. Fife should be paid to the executor of her last will, to be disposed of in due course of the administration of her estate; and that the share which had vested in Thomas Hardy should be paid over to the administrator of his estate, to be disposed of in due course of the administration of that estate. This appeal is prosecuted from the decree.

The matter presented for review is the construction given by the court to the ninth clause of the will of the testatrix. As it appears from the ninth clause of the will referred to, the testatrix devised to her brother Baptist Hardy the real estate described in trust; and vested the title thereof in him for certain uses and purposes, namely: That he sell the same either at public or at private sale, as he might deem best for the best interests of her estate and the persons interested therein; and for that purpose the will gives him full power and authority to execute all the necessary contracts deeds and other instruments necessary to pass the title of the real estate to any purchaser or purchasers of the same; and it is further provided in the will that after such sale has been made, and after the executor

and trustee had paid out of the proceeds of such sale, the costs and expenses thereof; and the expenses of the administration of the estate and the debts of the testatrix and the specific legacies which she provided for in her will, in case the personal estate of the testatrix be insufficient for that purpose, that then he should pay to her brother Clement Hardy one-eighth of the remainder of the proceeds of the sale of the real estate; and one eighth to her brother Thomas Hardy; and one eighth to her brother Joseph Hardy; and one-eighth to her sister Sarah E. Hopkins; and one-eighth to her sister Emma F. Fife; and retain one-eighth for himself; also that he pay one twenty-fourth to Ora Jenkins; and one twenty-fourth to Hazel Wright; and one twenty-fourth to Kenneth Jenkins; and one twenty-fourth to Leo Scott; and one twenty-fourth to Harold Scott; and one twenty-fourth to Rolla Scott, but, in the event that any of the persons named as beneficiaries were not living at the time of such distribution, then that their legal heirs should receive and be paid the amount which would have been payable to such deceased person, if he or she had been living. By the ninth clause of the will the testatrix created a trust estate which involved an equitable conversion of the real estate described therein into personal property; and the language used by the testatrix in the disposition of the shares to her brothers and sisters and nephews and nieces leaves no doubt about her intention that the receiving of their

shares out of the proceeds of the sale of the real estate was to be contingent upon their survival at the time fixed by the testatrix for the distribution. And it is also evident that the testatrix expected that the beneficiaries named would be alive at the time fixed in the will for distribution, for she provided that the trustee should pay to them and that they should receive from the trustee their respective shares in the trust estate; but the testatrix also clearly indicates, that in the event any of the beneficiaries were not living at the time for distribution what shall be done, namely: that then the amount which should have been paid to the beneficiaries if surviving should thereupon be paid to the legal heirs of the beneficiaries which did not survive.

We conclude therefore that the interests of the beneficiaries involved in the trust estate did not become vested interests at the death of the testatrix but were contingent upon their survival of the time fixed for distribution; and that the shares which Emma F. Fife and Thomas Hardy, both of whom died prior to the time fixed for distribution, when the time for distribution arrived vested in the legal heirs of these beneficiaries at the date of such distribution. This appears to be the clearly expressed intention of the testatrix. It is well settled in the construction of wills that the intention of a testator if it can be ascertained from the will, should govern the testate disposition of the property devised. **Walker v. Walker** 283 Ill. 11;

Banta v. Boyd 118 Ill. 186; **Boyd v. Bradwell** 19 Ill. App. 178; **Blance v. Maynard** 103 Ill. 60; **Maginn v. McDevitt** 269 Ill. 196; **Starr v. Willoughy** 218 Ill. 485; **People v. Jennings** 44 Ill. 488.

For the reasons stated, the decree is reversed and the cause remanded with directions to make distribution of the shares of Emma F. Fife and Thomas Hardy in accordance with the views herein expressed.

Reversed and remanded with directions.

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253 LA 890

General No. 8269

Agenda No. 25

OCTOBER TERM, A. D. 1928

W. A. Sutton, Administrator of the estate of Curtis
Sutton, deceased, Appellee

vs.

Village of Rankin, a Municipal Corporation, Appellant

Appeal from Vermilion

NIEHAUS, P.J.

The appellee, William A. Sutton as administrator of the Estate of Curtis Sutton deceased, commenced this suit in the circuit court of Vermilion county for the benefit of the father and mother and next of kin, and to recover damages sustained by the next of kin in the death of said deceased, which is alleged to have resulted from the negligence of the Village of Rankin, a municipal corporation, in disregarding its duty to keep a certain street in the village in a reasonably safe condition for travel. The allegation in the declaration concerning the negligence of the city is, that the village "not regarding its duty in that behalf wrongfully and negligently suffered the street to be and remain in a bad and unsafe repair and condition; and that chuck holes and ruts of the depth of, to-wit, 6 inches to exist on said street, along and near the edge of the pavement theretofore constructed on said street; and that said unsafe condition existed for a, long space of time, more than 30 days

prior to June 2, 1927; and that the appellant knew or by the exercise of reasonable diligence could have known of the condition of the street."

The record discloses that the deceased Curtis Sutton a boy about 14 years old on June 2, 1927, was riding in a dump bed fastened on the rear end of a Ford truck driven along Main street in the village of Rankin at a point where a 16 ft. pavement joins on to a 24 ft. pavement; and that in driving from the 16 ft. pavement to the 24 ft. pavement across the corner of the shoulder between the 24 ft. pavement and the 16 ft. pavement the truck and dump bed fastened thereto, struck a rut or chuck hole which jolted the truck and dump bed, in consequence of which the deceased fell out on the pavement and suffered a fracture of his skull, from which he died.

There was a trial by jury, and at the conclusion of all the evidence the appellant moved the court to direct a verdict for the Village, which the court denied. The jury returned a verdict finding the issues in favor of the appellee and assessing damages in the sum of \$2500.00, upon which the court rendered judgment. This appeal is prosecuted from the judgment.

It is contended by the appellant that the trial court should have sustained the motion to direct the jury to find a verdict in favor of the Village. We conclude however, that in

as much as there is evidence in the record tending to prove the negligence charged against the Village, that this motion was properly denied.

It is also insisted, that the court erred in excluding from the consideration of the jury two photographs which were offered in evidence. It may be said in reference to this contention, that the photographer who took the photographs, which purported to be a picture of Main street, including the place where the accident occurred, took them about the time of the trial of the case, that is to say, the beginning of February 1928. He also testified that the pictures correctly represented the views and situations surroundings and conditions shown in the picture at the time it was taken. There was no evidence adduced to show that the surroundings and conditions and situations on the street were the same at the time the picture was taken as they were at the time of the accident, namely June 2, 1927. The offer of the photographs, which was a general offer, was therefore properly denied.

Error is also assigned on the giving of certain instructions, namely numbers 2, 3, 4 and 5, for appellee. The instructions referred to are as follows:

2. The court instructs the jury that one of the allegations necessary to be proved in this case is that Curtis Sutton at the time of the accident in question was exercising due care and caution for his own safety. You are

instructed that if you believe that at the time of the accident in question Curtis Sutton was using the degree of care that a child of his age, experience, capacity and intelligence might reasonably be expected to use under circumstances similar to those under which the injury in this case resulted, then under the law he was exercising all the care for his own safety that the law required of him.

3. The court instructs the jury that if you believe that plaintiff's intestate was injured by the combined negligence of the Village of Rankin as charged in the declaration and of the driver of the truck in which he was riding, that the negligence of the driver of truck is no defense to a suit against the village of Rankin.

4. The court instructs the jury that if you believe that the Curtis Sutton became a passenger in a truck being driven by one Manley Thayden and that said Curtis Sutton had no control or management over said driver, any negligence of such driver in the operation of such truck cannot be imputed to Curtis Sutton so as to prevent the plaintiff in this case from recovering upon the ground of such contributory negligence, unless the evidence shows that Curtis Sutton contributed to such negligence on the part of said driver.

5. The court instructs the jury that if you believe that negligence on the part of the driver of the truck in question contributed jointly with the negligence of the village of Rankin, charged in the declaration, in causing the death of Curtis Sutton, that such negligence, if any, on the part of the truck driver, does not relieve the village of Rankin from liability for its negligence.

It will be noticed that none of the instructions direct the jury to base their belief upon the evidence. It is elementary as a rule of law, that the jury must form their belief as to the facts involved from the evidence in the case. Under the instructions however, the jury were allowed to conclude, that they might consider any matter whether in evidence or not in forming their belief concerning the specific matters pointed out in the instructions. These instructions are therefore erroneous. **City of Chicago v. Chemical Works** 330 Ill. 264; **Jackson v. Johnson** 212 Ill. App. 61; **Smith v. Belrose** 200 Ill. App. 368; **Conn Perfume Co. v. National Bank** 86 Ill. App. 642;

P D & E R R Co. v. Johns 43 Ill. App. 83; **Mathews v. Hamilton** 23 Ill. 470.

For the errors indicated judgment is reversed and cause remanded.

Reversed and remanded.

General No. 8273

Agenda No. 28

OCTOBER TERM, A. D. 1928

William E. Harris, Defendant in Error

vs.

Catherine Bell, Plaintiff in Error

Error to Macoupin

NIEHAUS, PJ.

In this case William E. Harris the defendant in error, recovered a judgment for \$4529.00 in the circuit court of Macoupin county as damages for injuries which he suffered by the collision of the automobile of the plaintiff in error, Catherine Bell, which she was driving, along a public highway in Macoupin county, with the automobile of the defendant in error. A writ of error is prosecuted to reverse the judgment.

The evidence in the record clearly tends to show that the defendant in error suffered serious bodily injuries in the collision referred to; and that the collision was brought about by the negligent acts of the plaintiff in error in driving her car along the public highway referred to.

The main contention made for reversal of the judgment is that evidence was improperly admitted on the trial of the case, from which the jury could infer, that the plaintiff in error 'was protected by an insurance company, which would have

to pay any judgment that might be rendered against her.' The evidence referred to is as follows: James Gooch, a witness called, testified: "My business is driving a taxi in Carlinville. I remember hearing of an accident south of Carlinville on January 19, 1927. Q. Did you go out there and assist in making some measurements? A. I took an insurance adjustor, I believe, out there. I believe he said he was an insurance adjustor. Q. I object to that answer and disclaim it. The Court: The objection is sustained and the answer excluded."

Bert Rice who was also called as a witness, testified: "I am a photographer living in Carlinville. I was employed to take a picture of the scene of an accident that occurred about the 19th of January, 1927, south of Carlinville. Q. Who went out there with you if any one? A. I think Miss Bell and I can't recall the man's name. He represented the Casualty Company in Chicago, I think. I took the picture marked defendant's Exhibit 1. We could see where there had been blood on the snow. That fairly represents the condition of the road there. The defendant offers the photograph in evidence as exhibit 1."

From the record of the testimony above set forth, it clearly appears, that neither the defendant in error nor the trial court was at fault in the matter of the introduction

of the evidence complained of; but that this evidence was injected into the case by the examination conducted by the plaintiff in error of its own witnesses. If any harm therefore resulted from the introduction of this evidence it cannot be charged against the defendant in error. To reverse the judgment for the reason urged would allow the plaintiff in error to take advantage of its own improper or incompetent evidence, for the reversal of the judgment. **People etc. v. Offerman** 84 Ill. App. 132; **The Schober & C L Co. v. Kerting** 107 Ill. 344; **Board of Trade T Co. v. Blume** 176 Ill. 247; **Emerick v. Heilman** 177 Ill. 368; **Botts v. Botts** 142 Ill. App. 216.

It is also contended, that the damages fixed by the jury are excessive. But in view of the seriousness of the defendant in error's injuries, some of which are apparently permanent, we do not regard the amount fixed by the jury as excessive.

For the reasons stated, judgment is affirmed.

Judgment affirmed.

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259 T. A. 630³

General No. 8274

Agenda No. 29

OCTOBER TERM, A. D., 1928

Wade C. Hise and Edna Hise, Appellees.

vs.

Omer L. Simpson and Violet B. Simpson, Appellants.

Appeal from Macon

NIEHAUS, PJ.

In this case an appeal was prosecuted from a judgment for \$108.58 rendered in the Circuit court of Macon county in favor of the plaintiffs in the suit, Wade C. Hise and Edna Hise and against the appellants Omer L. Simpson and Violet B. Simpson. The suit was commenced to recover an amount alleged to have been paid by the appellees for a special assessment against premises situated in the city of Decatur, concerning which the appellants had entered into written articles of agreement on the 10th day of April 1926 with the appellees, which are as follows, to-wit:

Articles of Agreement, Made this 10th day of April, A. D. 1926, between Omer L. Simpson and Violet B. Simpson (as joint tenants), party of the first part, and Wade C. Hise and Edna Hise (joint tenants).

Witnesseth, that if the parties of the second part shall first make the payments and perform the covenants hereinafter mentioned on their part to be made and performed, the said parties of the first part hereby covenants and agrees to convey and assure to the said parties of the second part, in fee simple, clear of all incumbrance whatever, by a good and sufficient Warranty Deed, the lot...piece...or parcel...of ground, situated in the County of Macon and State of Illinois known and described as The North Seventy (70) odd feet of Lot One (1) in Block Fifteen (15) of JORD'S Second Addition to the City of Decatur. It is the intention of parties of the first part to deed to parties of the

second part the North Seventy (70) odd feet of said lot or to the center of the two garages built on said lot and to be surveyed and more specifically described in the Deed. Warranty Deed to be deposited in the Minikin Bank with this Contract. And the parties of the second part hereby covenants and agrees to pay to the said parties of the first part the sum of Forty Eight Hundred (\$4800) Dollars, in the manner following: Three Hundred Fifty (\$350) Dollars cash, the receipt of which is hereby acknowledged. The balance of Forty Four Hundred Fifty (\$4450) Dollars to be paid in monthly installments of Fifty (\$50) Dollars per month, commencing May 1, 1926, and to be paid the first of each month for a period of Fifteen (15) months, after which said payment will be Forty (\$40) Dollars per month until paid down to amount of first Mortgage, giving first parties privilege of placing a mortgage on the above property of Thirty Five Hundred (\$3500) Dollars in the Building & Loan Association to be assumed by parties of the second part when the above payments are made down to the amount of first mortgage, with interest at the rate of 7 per centum per annum, payable monthly annually on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments, or impositions that may be legally levied or imposed upon said land, subsequent to the year 1925. And in case of failure of said parties of the second part to make either of the payments, or any part thereof, or perform any covenants on their part hereby made and entered into, this contract shall, at the option of the parties of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by them on this contract, and such payments shall be retained by the said parties of the first part in full satisfaction and in liquidation of all damages by them sustained, and they shall have the right to re-enter and take possession of the premises aforesaid coal and mineral rights reserved. Parties of second part agree to assume street tax due on and after December 1, 1927, and to keep property insured at its full insurable amount.

It is Mutually Agreed, By and between the parties hereto, that the time of payment shall be the essence of this contract; and that all the covenants and agreements herein contained shall extend to and be obligatory upon their heirs, executors, administrators and assigns of the respective parties.

In Witness Whereof, The Parties to these presents have hereunto set their hands and seals, the day and year first above written.

Wade C. Hise (Seal)
 Edna Hise (Seal)
 Omer L. Simpson (Seal)
 Violet B. Simpson (Seal)

Sealed and Delivered in presence of

On the trial of the case at the close of the evidence for plaintiffs, the appellants as defendants moved the court to direct a verdict for defendants, which motion was denied; and the same motion was renewed at the close of all the evidence. We

are of opinion that the court erred in denial of the motion.

It will be noticed that in the articles of agreement referred to that the appellees agreed "to pay all taxes, assessments, or impositions that may be legally levied or imposed upon said land, subsequent to the year 1925." And it was therefore a necessary element of proof as a basis for appellees' right of recovery for special assessments or taxes levied against the premises in question that they were levied or imposed before the year 1925. There is no evidence in the record, that the payment made by the appellees on April 6, 1927 of \$187.26 was for a special assessment levied prior to the year 1925, and no such inference of fact can be drawn from the special assessments paid April 6, 1927, that it was levied or imposed against the premises prior to the year 1925 even though delinquent. In this state of the record, the court should have allowed the appellants' motion to direct a verdict finding the issues in favor of the appellants; and it was error to refuse to do so. We are not passing on the legal sufficiency of appellants' defense to the appellees action based on the contention that by mutual agreement and consent the parties set aside and abrogated the articles of agreement herein referred to, and that the appellees thereupon entered into a new contract with W. L. Klausmeier the owner of the fee of premises here involved, for the purchase of the property, because it in-

volves controverted questions of fact.

For the error indicated the judgment is reversed
and the cause remanded.

Reversed and remanded.

2551A.630⁴

General No. 8290

Agenda No. 40

OCTOBER TERM, A. D. 1928

Paul Farley, Appellant

vs.

W. H. Diller and The Hurlbut Farmers Grain Company, a Corporation, Appellees.

Appeal from Sangamon

NIEHAUS, JP.

In this case the appellant, Paul Farley, sought to recover from the appellees, W. H. Diller and the Hurlbut Farmers Grain Company a balance which he claimed was due him on account of 2299 bushels of corn delivered to the Elevator Company on or about the 29th day of May 1918. There was a trial by jury in the circuit court of Sangamon county. At the close of the evidence for the appellant, on motion of the appellees, the court directed the jury to return a verdict in their favor, which was done; and the court thereupon rendered judgment on the verdict and for costs against the appellant. This appeal is prosecuted from the judgment.

The legal propriety of the action of the court in directing the verdict is the question presented for review. The appellant Paul Farley on the trial of the cause, testified concerning his claim as follows: "I delivered corn in May 1918,—

2999 bushels according to the sheller man's figures. Yes, I have a memorandum of it, 2999 bushels at \$1.41 a bushel. Amounts to \$4228.59. It was shell corn. Raised in 1917 and delivered in 1918. The grain company paid all but 802 bushels. They paid Mr. Taylor; he had a mortgage on the corn, and went over and settled for it, all but 802 bushels. They paid all but \$3097.77. The mortgage wasn't for that much. This is what they paid, \$3097.77. After deducting that from the mortgage, paid by this company, there was a balance of \$1130.82. The defendants or any one of them never paid me that balance. Mr. Waddel received the corn when I delivered it there, as manager for the concern. I did not have a settlement with this grain company or with Mr. Diller for my portion of the corn." On cross examination, the appellant testified with reference to the alleged joint liability of the appellee Diller "this memorandum that I have I went down and took it off the man's book that shelled the corn. He got it from the elevator; he taken it off the books, there was 2999 bushels. I took it off quite a while ago. I guess about nine years after the corn was delivered. I dont remember when this mortgage was paid off after I delivered the corn in May, 1918; about the next month, I guess. I think I got the papers back from these people that had the mortgage. I wouldn't say for sure. After they got the money; they went

out and drew the money. I figured that up about a month after I delivered the corn. Somewhere along about June, 1918. It was firmly in my mind how much the elevator owed me. I knowed they owed me. These dealings I had were not with Mr. Diller personally. I delivered the corn to the elevator. My dealings were with the elevator. I didnt have any individual dealings with W. H. Diller, he was an officer in the company." *****Mr. Trutter: Q. Then you have no claim against W. H. Diller personally have you? Mr. Friedmeyer: I object to that. Mr. Trutter: Have you a claim—The Court: He may answer. A. Yes, I think I have, he being a high officer in the elevator company, he owns most of it or did at that time. At the time I sold my corn—I sold my corn to the elevator. Did not sell it to W. H. Diller individually."

It clearly appears from the appellant's own testimony that the appellee Diller was not legally liable either jointly or severally for the balance which he claimed was due him for the corn sold to the elevator company in May 1918. It is also apparent, that appellant's claim against the appellee Hurlbut Farmers' Grain Company was barred by the Statute of Limitations, which was pleaded by the company in defense of the claim. We conclude therefore, that the court did not err in directing a verdict for the appellees; and the judgment is therefore affirmed.

Judgment affirmed

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2531A-630⁵

General No. 8215

Agenda No. 2

OCTOBER TERM, A. D. 1928

American Slicing Machine Company, Appellant,

vs.

Jesse S. Bennett, Appellee.

Appeal from Circuit Court Vermilion County

ELDREDGE J.

Appellant, the American Slicing Machine Company brought an action in assumpsit to recover \$176, balance due on a slicing machine sold to appellee, Jesse S. Bennett, and the trial resulted in a verdict for appellee. The contract of sale was a written one wherein the appellee promised to pay \$200.00 for the machine. \$24.00 was paid as an advance payment and the contract provided that the balance should be paid in monthly payments of \$16.00 each. The contract also contained the following provision: "No verbal agreement can change or modify the conditions of this contract, and the undersigned states that there is no verbal or written understanding or agreement different from or other than the printed conditions on this contract." The machine was sold through an agent of appellant and, at the time that the written contract above mentioned was signed, another agreement was signed as follows: "It is hereby understood and assured that if for any

reason the American Scout is unsatisfactory, same can be returned after ninety days and all payments refunded. American Slicing Machine Co., Per D. P. Fitzgerald." Appellee claimed the machine was not satisfactory and offered to return it and demanded the repayment to him of the \$24.00 which he had paid on the contract price thereof.

On the trial appellee filed originally four pleas, the first being that of the general issue and the other three special pleas. The first special plea sets up the second agreement mentioned and alleges that the real and true consideration between the parties was that if the slicing machine in said contract mentioned and left with the defendant was, for any reason, unsatisfactory, the defendant had the right to return the same within ninety days and to recover back all payments made, and concludes to the country. The second special plea alleges that the machine was not satisfactory of which fact he gave notice to the plaintiff after making some payments and demanded repayment of the money already paid to the plaintiff and offered to deliver said machine back to the plaintiff and that there is a failure of consideration for both of said contracts. The third special plea averred that said Fitzgerald obtained the original contract by knowingly, wilfully and fraudu-

lently procuring and inducing the defendant to pay money to the plaintiff under false pretenses and upon false representations, that if the slicing machine was unsatisfactory he could return it and receive all payments made on the same and by reason thereof the defendant was induced to rely upon said representations and believed them to be true. To the third special plea a demurrer was filed and sustained. The first and second special pleas as abstracted were bad and presented no defense to the declaration. However, appellant filed replications thereto. Subsequently two additional pleas were filed, neither of which were good as legal defenses to the action, but to which replications were also filed.

On the trial appellant called appellee as a witness to identify his signature to the original contract and for no other purpose. After this was done the court permitted, over objection, counsel for appellee to ask many questions calling forth in detail the statements made by Fitzgerald, the agent, to appellee in regard to the signing of the secondary agreement. This was error as the examination of appellee in chief was confined solely to the identity of the latter's signature to the contract sued upon, and the cross examination permitted by the court was not proper cross examination.

of the witness. The court permitted this cross examination upon the theory that it tended to show a ratification of the acts of Fitzgerald by appellant and tended to show fraud on the part of Fitzgerald. There was no plea nor evidence tending to show any ratification of the second agreement signed by Fitzgerald, as agent, by appellant, nor was there any plea of fraud in inducing the signature to the original contract. The defenses of ratification and fraud were affirmative defenses and under the circumstances shown it was error to permit appellee to testify on cross examination to the conversation between himself and the agent which lead up to the execution of the second agreement by the agent.

The original contract specifically provided by its terms that on verbal agreement could change or modify the conditions thereof. This was notice to appellee of the lack of the authority of the agent, Fitzgerald, to make any other or different contract than that provided in the original contract. The fact of agency and the authority of the agent cannot be established by showing what the agent said or did and the power of the agent can only be proved by tracing it to the source of authority, the principal, by some word or act of such principal. **Merchants National Bank v. Nichols & Co.**, 223 Ill. 41. Appellee was permitted to testify in making out his own case

in detail, the conversation he had with Fitzgerald, the agent, in regard to said secondary agreement signed by the latter. Other witnesses who were present at the time were also permitted to testify in detail in regard thereto. All of this evidence was erroneous and should not have been permitted to have been given. The secondary agreement was also admitted in evidence without any proof of any kind that Fitzgerald had any authority from appellant to make such an agreement. There was no evidence in the case even tending to show that appellant ever ratified this secondary agreement.

The only instruction given on behalf of appellee was as follows:

"The defendant by his third special plea says that D. P. Fitzgerald, the authorized agent of the plaintiff, knowingly, wilfully and falsely procured and induced this defendant to pay money to the plaintiff under false pretenses and upon false representations that if the slicing machine referred to in the plaintiff's declaration which was left with the defendant by the said agent, was unsatisfactory he could return it and receive all payments made on the same, and by reason thereof this defendant was induced to rely upon said representations and believed them to be true, and had no knowledge otherwise, and said slicing machine was unsatisfactory, of which fact he gave notice to the plaintiff and demanded return of his money, and offered to return said machine, and that said contract in his declaration and in the contract set forth and referred to in the defendant's pleas were entered into by and on account of said false and fraudulent representations of the plaintiff's said agent, and not otherwise, and if you believe that the defendant, has proven these facts set forth in this third special plea of the defendant by the preponderance of the evidence, your verdict should be for the defendant and you should find him not guilty."

The only plea attempting to raise the question of fraud

in procuring of appellee's signature to the original contract was the third special plea to which a demurrer had been sustained and that issue had been thereby eliminated from the case.

For the errors mentioned the judgment of the Circuit court is reversed and caused remanded.

Reversed and remanded.

258 L.A. 631

General No. 8242

Agenda No. 5

OCTOBER TERM, A. D. 1928

Oscar Seegar, Defendant in error,

vs.

Luther A. Perrine, Plaintiff in Error

Writ of Error to the County Court of Macoupin
County

ELDREDGE J.

Oscar Seegar, defendant in error, brought suit in replevin against J. P. Hirn, Andrew McCabe and Luther A. Perrine, (the latter being the plaintiff in error here) to recover the possession of a certain piano which the defendant in error had before that time purchased from Hirn on a conditional sale or title retention contract. At the trial Hirn and McCabe were dismissed out of the case. The facts in brief are as follows: On January 12, 1924, Seegar and his wife entered into a written contract with the Hirn Piano Co., for the purchase of a piano for the sum of \$600.00, of which \$60.00 was paid in cash and of the balance \$10.00 were to be paid every fourteen days until \$100 had been paid and the balance was to be paid at the rate of \$15.00 per month; on April 6, 1925, J. P. Hirn, individually, brought suit before a justice of the peace in replevin against Seegar and wife to recover possession of the piano; in the affidavit for replevin Hirn stated the value of the piano to

be \$360.00; no demand for the possession of the piano was made either upon Seegar or his wife; no service was ever had upon Seegar; the constable went to Seegar's house, took possession of the piano and delivered it to plaintiff in error, Perrine; Perrine claims he purchased it from Hirn; when Seegar learned that the piano had been taken away from his home and that Perrine had possession of it, he sued out this writ of replevin in the County Court of Maconpin County to recover its possession. Hirn, although originally made a party to the suit, did not appear or make any defense or testify in the case. For some reason he was dismissed out of the case. Hirn sold the piano to Perrine even before he took the possession of it away from Seegar according to Perrine's testimony.

Under the contract of sale from Hirn & Company to Seegar, Seegar had the right to the possession of the piano until he defaulted in his payments. There is no proof of any such default. The original replevin suit before the justice of the peace was instituted by Hirn individually and not in the name of Hirn & Company. There is no proof whatever that they are one and the same concern. Moreover the value of the piano in the affidavit for the replevin before the justice of the peace is given at \$360.00. By the fifth

paragraph of section one, article II of Chapter 79. Smith-Hurd's Ill. Rev. Stat. 1927, the jurisdiction of a justice of the peace in replevin suits is limited to property where the value thereof does not exceed \$300.00. It is apparent the justice had no jurisdiction of the subject matter of the replevin suit. Under a contract of this character it has been held that before the vendor can recover the possession of the property sold thereunder where there is a default in the payment of the installments he must first make a demand. Under the evidence in this case Seegar clearly had a right to recover possession of the property from Perrine and the judgment of the County court is affirmed.

Affirmed.

162

17

257 T. J. 631²

General No. 8257

Agenda No. 17

OCTOBER TERM, A. D. 1928

Jerry T. Ring, Appellant.

vs.

Trumbull U. Smirl, Appellee.

Appeal from Circuit Court, Morgan County.

ELDREDGE J.

Appellant brought his action on the case in the Circuit Court of Morgan County to recover damages for injuries sustained by him when he was struck by a Ford truck of appellee on East Morton Avenue, in the City of Jacksonville, between six and six thirty o'clock P. M., on the night of November 12, 1926. The trial resulted in a verdict of not guilty.

The first count of the declaration charges general negligence on the part of appellee in driving the car. The second charges that appellee was driving the car at a greater speed than was reasonable and proper, having regard to the traffic and use of the way or so as to endanger the life or limb of any person. The third charges the car was driven at an excessive rate of speed in the night time without being properly equipped with two lighted lamps showing lights visible at least two hundred feet in the direction toward which it was proceeding. The fourth

charges that a piece of strap iron one and one-quarter inches in width and one-eighth inch in thickness extended outwardly from said automobile and beyond the outer edge of the right front fender, and was contrived for the purpose of carrying lumber or other material on the right side of the truck and that by the negligence, carelessness and mismanagement of the defendant he drove the automobile with great force, with said contrivance extending therefrom, against the plaintiff, etc.

Plaintiff was forty-five years of age and conducted a grocery store and meat market in Jacksonville. East Morton Avenue extends east and west. Whitlock's grocery store was located on the south side of East Morton Avenue between South Clay Avenue and South East Street. Appellant desired to deliver cheese to Whitlock's store. He proceeded west on the north side of East Morton Avenue until he came opposite Whitlock's store, which was about in the center of the block. He stopped his car facing west along the north curb of East Morton Avenue. The night was somewhat foggy or misty. As he got out of his car on the south side thereof and started toward the rear seat to get the cheese two other cars passed him traveling east. He got his cheese from the back seat of his car and started to cross the street to Whitlock's store with the cheese.

in his arms and had taken him a few steps when he was struck by the car driven by appellee. He was knocked to the ground, his leg was broken, and he received some other injuries. The evidence on the part of appellee tends to show that he was driving his truck at a speed not exceeding ten miles per hour with his lights burning though dimmed and that he did not see appellant at all and there is no evidence tending to show that he was driving at any faster speed or that his lights were not lit or that they were in any way defective. In so far as the merits of the case are concerned they were purely questions of fact for the jury to determine.

The 16th instruction given on this case is criticised because it, in substance, instructs the jury that in determining the question whether or not the defendant is legally liable to the plaintiff for his injury, they should not take into consideration the nature and extent of the plaintiff's injury and that the nature and extent of plaintiff's injury is immaterial in the case that tends to prove the question of liability or fault on the part of the defendant and that they should decide the question of liability wholly independent of the question of damages sustained by the plaintiff. There is no harm in this instruction as it simply told the jury that the liability was to be for caus-

ing the injury to appellant should not be determined by the extent of appellant's injuries. That instruction 21 given on behalf of appellee was also erroneous. This instruction told the jury that the law required the plaintiff in this case to exercise ordinary care as herein defined for his own safety at and just before the time of the injury, in view of his intelligence, experience and capacity to care for himself so far as shown by the evidence. This form of instruction is the one usually given in defining the degree of care charged to an infant or an adult under some disability. Appellant was not an infant nor was he under any physical disability. The instruction is more favorable to appellant than it need have been and he cannot complain of it as error. Instruction 18 given for appellee is the usual instruction charging the jury that if they believed from the evidence that plaintiff was guilty of any negligence which in any degree contributed to his injury then they should find the defendant not guilty. There was no count in the petition charging wilfulness or wantonness and no evidence to sustain such a count if there had been. The instruction was proper.

Appellant also complains that the court erred in refusing instruction No. 27. This instruction told the jury that the burden

of proof is upon the plaintiff and it is for him to prove his case by a preponderance of the evidence; still if the jury finds from the evidence bearing upon plaintiff's case preponderates in his favor although but slightly, it would be sufficient for the jury to find the issues in his favor. While this instruction announces a correct proposition of law it has been subject to the criticism that it is argumentative and confusing and might lead the jury to believe that the court is inclined to favor the plaintiff. It was not error to refuse it, *Revitz v. Chicago Rapid Transit Co.*, 327 Ill. 207; *O'Donnell v. Armour Curled Hair Works*, 111 Ill. App. 523; *Chicago Ry. Co. v. Nelson*, 117 Ill. App. 609.

No errors have been suggested on the ground of error or exclusion of evidence and the great weight of the evidence apparently shows that defendant was not guilty of any negligence of any kind in the driving of his car. The jury could not have demanded a verdict and have rendered the verdict which it did.

There being no reversible error in the record the judgment of the Circuit court is affirmed.

Judgment affirmed.

152 H
General No. 8263

Agenda No. 20

OCTOBER TERM, A. D. 1928

P. J. Breen, Appellant,

vs.

Fred Rhoads, Appellee

Appeal from Circuit Court Edgar County

ELDRIDGE J.

A jury was waived in this case and the cause submitted to the court for trial. The court found the issues joined in favor of appellee and entered judgment accordingly. Appellant brought a suit in assumpsit to recover for merchandise furnished to Dovey Johnson, mother of Nora L. Glick, a minor, of whom appellee was the guardian. The minor owned a farm which appellee, as guardian, had leased to one A. G. T. Heath, for a rental of one-half of the crops raised thereon, and part of appellant's claim is also for merchandise and moneys furnished to said Heath at the request of appellee. Appellant testified that appellee told him that if he would furnish the said merchandise to Mrs. Johnson he would pay for the same. He also testified that appellee made the same agreement with him if he would furnish merchandise and advance certain moneys to Heath. Appellee testified that his agreement with appellant was that if the latter would furnish the merchandise mentioned to Mrs. Johnson for

the support of his ward, he would pay for it, as guardian, out of the funds he received as such guardian. In regard to the merchandise and money advanced to Heath, appellee testified that he told appellant that if the latter furnished Heath with said merchandise and money he would see that appellant was paid for them out of the first money received by Heath from his crop when it was harvested in the fall. These accounts ran for several years and at times were settled in full by appellee. The account sued for is one running from the thirteenth day of May, 1923 to the twenty-third day of June, 1926. Appellant brought his suit against appellee individually. Counsel for appellant, in their brief and argument say, "There are no questions of law involved in the case. We contend that the overwhelming weight of the evidence was in favor of the plaintiff in the suit and that a careful review of all the evidence shows that the judgment should be set aside and judgment rendered in this court for the amount of plaintiff's claim." There is evidence tending to support both theories of the case. The court heard the testimony and saw the witnesses and was in a better position to determine where the preponderance of the evidence lay than this court is. After a careful review of the evidence we cannot say that the greater weight of the evidence is in favor of

appellant and that the trial court erred in its finding of the issues in favor of appellee.

The judgment of the Circuit court is affirmed.

25070 631³

General No. 8267.

Agenda No. 23

OCTOBER TERM, A. D. 1928

T. J. Sullivan, Appellee,

vs.

John J. Nicholson and Celea Nicholson, Appellants.

Appeal from Circuit Court, Sangamon County.

ELDREDGE J.

A judgment by confession for the sum of \$6,427.33 in favor of T. J. Sullivan, appellee, and against John J. Nicholson and Celea Nicholson, appellants, was entered at the January term of the Circuit court of Sangamon County on February 21, 1928. The transcript of this judgment was filed in the office of the clerk of the Circuit court of Will County and execution issued thereon March 3, 1928, and was served upon appellants May 17, 1928. On June 7, 1928, at the May term of the Circuit court of Sangamon County, appellants moved for an order to stay the execution, open up the judgment and for leave to plead to the merits. Their motion was supported by the affidavits of appellants and of their son, Edward Nicholson. The trial court entered an order overruling the motion, to review which action this appeal is prosecuted.

In the affidavit of John J. Nicholson the affiant states

that he resides in the city of Joliet, Illinois, is the husband of Celea Nicholson and the father of Edward Nicholson; that a judgment was rendered against him and Celea Nicholson in favor of T. J. Sullivan in the Circuit Court of Sangamon County, at the January Term, A. D. 1928, for the sum of \$6,427.33 and costs; that said judgment was based on a promissory note dated at Springfield, Illinois, September 13, 1927, for the sum of \$10,000.00 due on demand after date and payable to the order of T. J. Sullivan at the First National Bank of Springfield, Illinois, with interest at the rate of six (6) per cent from date until paid, which note contained a confession of judgment clause and provided for attorney's fees of \$250.00 and on which said note there was endorsed as paid the sum of \$3,000.00 on September 24, 1927, and the sum of \$1,000.00 on December 29, 1927; that T. J. Sullivan, the payee in said note, is one and the same person as the plaintiff in the above cause; that a transcript of the aforesaid judgment was filed for record in the office of the Circuit Clerk of Will County, on March 2, 1928; that the Clerk of the Circuit Court of Will County, on March 3, 1928, issued an execution on said transcript of judgment to the Sheriff of Will County, which said execution was received by the Sheriff of Will County on March 3, 1928, and by virtue of which said Sheriff levied the

same upon certain real estate on the 17th of May, 1928; that said Sheriff has given notice that he will sell said real estate on Friday, June 8, 1928 to satisfy said judgment; that he had no knowledge or notice of any kind or character that said judgment had been rendered against him and the said Celea Nicholson until May 17, 1928, when he was served by the Sheriff of Will County with a copy of said execution issued March 3, 1928; that Edward Nicholson was confined to St. Joseph's Hospital by reason of an operation for appendicitis from August 23, 1927, to September 2, 1927, and on said date when he was leaving the hospital was arrested on a warrant issued out of the Circuit Court of Christian County on an indictment charging him with robbery in the case entitled The People of the State of Illinois v. William O'Hara, et al; that affiant consulted with James W. Faulkner, attorney at law of Joliet, concerning said case and said Faulkner urged affiant to employ some attorney to assist him who resided nearer to Taylorville, who would be in touch with local conditions in Christian County; that affiant suggested to Faulkner that he would employ T. J. Sullivan, an attorney at law at Springfield, whom affiant had known for some years, to assist Faulkner, and that said suggestion met with the approval of said Faulkner; that during the time

Edward Nicholson was still under the care of a physician and was confined to the Police Station at Joliet, affiant, Faulkner and Sullivan all went to Pana, Illinois, to interview C. H. Priehs, State's Attorney of Christian County, to see if arrangements could be made to allow said Edward Nicholson to remain at the Police Station in the City of Joliet until he had fully recovered from the effects of his said operation and where he could be under the care of his local physician; that said Priehs advised affiant that such plan was agreeable to him but that this affiant would have to get the consent of the Sheriff of Christian County to any such arrangement; that affiant, Faulkner and Sullivan went to Taylorville to interview said Sheriff who was out of town and who could not be found; that said matter was left to be handled by said Sullivan who was to see or telephone said Sheriff; that on September 11, 1927, Edward Nicholson was taken by the Sheriff of Christian County from the Police Station of the City of Joliet to the City of Taylorville where he was confined in the County Jail of Christian County; that neither affiant nor said Edward Nicholson had any knowledge of the intended action of the Sheriff of Christian County and that this affiant did not know that Edward Nicholson was to be removed from the Police Station in the City of Joliet until after he was gone;

that early in the morning of September 13, 1927, affiant accompanied by Celea Nicholson, his wife, Ann Nicholson, the wife of said Edward Nicholson, and Mary Tezak, the mother-in-law of said Edward Nicholson, left the City of Joliet by automobile to go to Taylorville to give bond for said Edward Nicholson in said cause; that at Springfield affiant met Faulkner and Sullivan in accordance with a previous appointment at which place affiant entered a car occupied by Faulkner and Sullivan and driven by a son of said Sullivan and rode with them from Springfield to Taylorville; that on said date Edward Nicholson was released on bond and all of said persons, together with Edward Nicholson, returned by automobile to Springfield; that at or about the hour of one-thirty o'clock P. M., Faulkner advised affiant that he should go to the office of Sullivan and make arrangements with Sullivan relative to the manner of payment of the fees to be paid Sullivan and Faulkner for services to be rendered by them for the defendant, Edward Nicholson, on the charges brought against him in said case; that affiant requested Faulkner to go with him to Sullivan's office which Faulkner declined to do saying "Whatever arrangements you make with Sullivan will be all right with me"; that affiant directed Edward Nicholson to gather his party together, park his automobile as near to the building in which Sullivan had his office

as he could and then go to the office of Sullivan; that affiant then went to the office of Sullivan and while discussing with him the charges brought against Edward Nicholson, he the said Edward Nicholson arrived at Sullivan's office; that Sullivan stated the case would be a hard one to defend as public sentiment was against the Shelton Brothers and that they would in all probability be convicted whether guilty or innocent; that said Edward Nicholson would probably be convicted along with them and that if convicted his only hope would be on an appeal to the Supreme Court; that Sullivan then asked affiant to sign a note for \$10,000 but this affiant protested it was too large a fee and told Sullivan that he could not pay that much; that Sullivan said that the note was intended as security for all possible services which might be required in the case including the trial thereof and all expenses of taking the case to the Supreme Court in the event Edward Nicholson was convicted; that it was not possible to determine the value of the services to be rendered until it would be told how long the trial would last and whether or not it would be necessary to take the case to the Supreme Court; that affiant told Sullivan that with said understanding he would sign the note and trust to Sullivan's fairness on fixing the fee after the services were rendered; that affiant then signed said

note and Sullivan stated that it should also be signed by affiant's wife; that Edward Nicholson left Sullivan's office and returned with affiant's wife, Celea Nicholson; that she had been suffering with nervousness and was then and had been for over four years under the care of and receiving medical treatment from various physicians and at the time in question she was in a state of nervous collapse; that affiant told Celea Nicholson to sign said note, which she did, whereupon she was immediately accompanied from said office by Edward Nicholson; that affiant in making said arrangements with the said Sullivan was acting for himself and as the agent for Celea Nicholson; that a few moments after Celea and Edward Nicholson left the office of Sullivan, James W. Faulkner came in to the room in which Sullivan and affiant were, whereupon affiant left said office and went to the automobile in which Celea Nicholson, Edward Nicholson, Ann Nicholson and Mary Tezak were; that shortly thereafter James W. Faulkner came to said automobile and all of said persons came to Joliet in said machine; that a few days prior to September 23, 1927, James W. Faulkner told affiant that Sullivan was demanding that a substantial payment be made on the note and that the same should be made in order that no dissatisfaction should arise; that affiant on September 23, 1927, delivered to James W. Faulkner



his check drawn payable to the order of T. J. Sullivan for the sum of \$2500, which check was endorsed by the said T. J. Sullivan and was paid by the Joliet National Bank on September 28, 1927; that prior to the time said note was given Edward Nicholson paid to James W. Faulkner the sum of \$500.00 in cash and that the sum of \$3,000.00 endorsed on said note under date of September 24, 1927, was the proceeds of said check for \$2500.00 paid to Sullivan by affiant and the sum of \$500.00 paid by Edward Nicholson to James W. Faulkner; that a few days before December 29, 1927, Faulkner again advised affiant that Sullivan was insisting that a further payment be made on the note and affiant gave Faulkner \$1,000.00 in cash, which sum was endorsed on said note under date of December 29, 1927; that after said last payment neither the said Faulkner nor Sullivan nor either of them ever asked affiant for any further payments on said note, and that neither of them ever sent any bill to affiant for services rendered by them for said Edward Nicholson in said case; that copies of the aforesaid execution issued by the Clerk of the Circuit Court of Will County were served upon affiant and Celea Nicholson on May 17, 1928, by the Sheriff of Will County and that on May 18, 1928, affiant went to the office of James W. Faulkner and asked him what could be done in the matter;

that affiant did not take the copy of said execution with him but was advised by Faulkner that if the term of the court at which the judgment was rendered had passed that nothing could be done; that affiant on May 19 or May 21, 1928, again took the copy of said execution to Faulkner and that he, after examining same, told affiant that the term of court at which said judgment was rendered had expired and that there was nothing that could be done towards opening said judgment; that affiant relied upon the statements of said Faulkner and did nothing further in the matter until on June 1, 1928, when affiant at the solicitation of Edward Nicholson consulted with James A. Bray, an attorney at law of Joliet, who on June 2, 1928, advised him that if he and Celea Nicholson had no knowledge of the said judgment having been brought against them at the January Term, 1928, of the Circuit Court of Sangamon County, the court had power to set aside the judgment and to allow affiant and Celea Nicholson to defend said case even though the term at which the judgment was rendered had passed; that said James A. Bray was engaged in preparation for the trial of various tax objections in Will and Grundy counties and was unable to take care of said matter for this affiant and Celea Nicholson; that affiant went to the office of Robert W. Martin, an attorney at law in the City of Joliet, on the afternoon

of June 2, 1928, to employ Martin to represent him and his wife in the above entitled cause but that Martin was not in his office; that affiant called Martin's home by telephone on June 3, and found that he was out of the City of Joliet for the day and that affiant was unable to get in touch with him until late in the afternoon of June 4, 1928, when affiant employed said Martin to represent affiant and Celea Nicholson in said cause; that Edward Nicholson was never placed on trial under the said indictment and that said indictment was afterwards, on April 26, 1928, nolleed as to the said Edward Nicholson; that the sum of \$4,000.00 heretofore paid the said T. J. Sullivan and said James W. Faulkner was greatly in excess of the usual and customary fees which would have been charged in the same community for like services as were rendered the said Edward Nicholson by the said Sullivan and Faulkner in cases where no contract had been entered into between the parties; that there had been a partial failure of consideration for said note and that affiant has a good defense on its merits to the whole of said note excepting the sum of \$4,000.00 which has heretofore been paid thereon.

The affidavit of Celea Nicholson is substantially the same as that made by her husband. The affidavit of Edward Nicholson corroborates all the essential facts set out in the affidavits of his



father and mother in so far as they were within his knowledge and the following additional facts concerning the services performed by appellee and Faulkner, to-wit: that when he was confined in the police station in Joliet he gave Faulkner the sum of \$500.00, which amount appellee afterwards told him would be credited on the \$10,000.00 note; that he never saw appellee except on three occasions, viz., on the date he was admitted to bail, on the date when he was arraigned and pleaded to the indictment, and on the date when he was granted a separate trial; that Faulkner consulted him three or four times while he was confined in the police station at Joliet; that Faulkner was at Taylorville on the day when bail was granted and also on the day when affiant was arraigned and pleaded and was at Springfield with affiant on the day when a separate trial was granted him; that Faulkner informed affiant that he had been in conference at Springfield with Sullivan on affiant's case on two or three other occasions and also that he appeared in the Circuit court at Taylorville on the day when said indictment against this affiant was nollied; that Faulkner also informed him that he and Sullivan had gone to Pana and Taylorville on behalf of affiant during the time affiant was confined in the police station at Joliet; that affiant has no knowledge or information of any other

services rendered by said Faulkner and the said Sullivan or either of them on his behalf in said case; that he did not enter into any contract with Faulkner or Sullivan or either of them, as to the amount which they were to be paid for services to be rendered him in said case.

A motion to open up a judgment is addressed to the equitable powers of the court and if reasons are shown by appellants in their affidavits (the facts in which must be considered as true in passing upon said motion) that in equity and good conscience the judgment should be opened up and a trial had upon the merits, there is an abuse of discretion if the same is not done. All the affidavits filed in this case state that the note was given to secure the payment of all reasonable fees and expenses of counsel in the preparation and trial of the case and upon a writ of error, if necessary. In other words, it was to secure the payment of all reasonable fees and expenses which a client might be legally bound to pay in the future defense of the case. The amount represented in the note included possible fees and expenses which might be charged in the trial of the case and in prosecuting a writ of error to the Supreme court, if that should become necessary. There was no trial of the case and it was not necessary to sue out any writ



of error from the Supreme court. No bill for fees or expenses was ever rendered to appellants. The damages were unliquidated and could not be ascertained without proof. Appellee and Faulkner were present in court on the three occasions above mentioned only and had three or four interviews with Edward Nicholson. Appellants had already paid these attorneys \$4000.00 in cash, which, prima facie at least, could be reasonably presumed to have been ample compensation for such services as were performed by appellee and Faulkner, as set out in the affidavits. As we understand the brief and argument of appellee, it is not seriously contended that the affidavits do not show a defense to the merits in that there was at least a partial failure of consideration of the note, but their principal contention is that appellants have been guilty of laches in making the motion. To this contention we cannot agree. While it is true that the judgment was entered in the Circuit court of Sangamon County, February 21, 1928, yet appellants aver in their affidavits that they had no knowledge of such judgment until May 17, 1928, when the levy was made upon the property of appellant, John J. Nicholson, by the sheriff of Will County. Appellants further state in their affidavit that on May 19th or May 21st, 1928, said

Nicholson took a copy of the execution to Faulkner, who told him that nothing could be done towards opening the judgment because the term at which it was rendered had expired. Appellant then on June 2, 1928, consulted James A. Bray, an attorney at law at Joliet, who advised them that if they had no knowledge of said judgment having been rendered against them in the Circuit court of Sangamon County during the term at which it was entered, then the court had power to set aside the judgment at a following term. They attempted to employ Mr. Bray but was unsuccessful for the reason that he was engaged in the trial of other matters. Appellants then attempted to consult Robert W. Martin, another attorney of Joliet, on the same day and to employ the latter to represent them, but Martin was out of town and appellants were unable to procure his services until June 4. The motion was made on June 7. Appellee and Faulkner were employed by appellants to defend their son in the case mentioned. The fiduciary relationship of attorney and client existed between them and appellants with whom they were required to act in the utmost good faith. If the allegations in the affidavits are true, which must be presumed upon the hearing of this motion, they did not do so. They never rendered any bill to appellants or asked them to pay for any additional

services or expenses performed or paid out by them after the payment of the \$4,000.00. They entered judgment on the note in a County many miles away from where appellants resided. No attempt was made to file the transcript of the judgment in Will County until the term at which the judgment was rendered had expired. After the execution was issued on the transcript of the judgment, John J. Nicholson consulted Faulkner in regard thereto, and the latter advised him that the judgment could not be opened up and that appellants were precluded from making any defense thereto. While the judgment was taken in the name of Sullivan individually, it is conceded that it is for the benefit of both Sullivan and Faulkner. An attorney cannot mislead a client in order to profit himself thereby.

A counter affidavit executed by Faulkner was filed. This affidavit tended to show that appellant, John J. Nicholson, told him on the 10th day of March, 1928, that an attorney had informed him that a transcript of a judgment obtained by Sullivan in the Circuit court of Sangamon County had been filed in the Circuit Clerk's office of Will County. A motion was made to strike this affidavit from the files, which was overruled by the court. In this we think the court erred. The cross affidavit of Faulkner directly puts in

issue the question as to when the appellants had actual knowledge of the confession of the judgment in Sangamon County and consequently the merits of appellants' contention to have the judgment opened up and for leave to plead. As before stated, such motions are addressed to the equitable powers of the court. This counter affidavit puts in issue a question of veracity between the three affiants who filed affidavits on the part of appellants, and Faulkner. In passing upon a motion of this character the trial court should determine the question upon principles of equity and good conscience. A motion of this kind always presents two questions: has the defendant, by its affidavit, shown that he has a good defense to the whole or part of the cause of action, and was the motion made in apt time. One is as material as the other and each question must be determined upon the affidavit or affidavits filed by the defendant, which, in the consideration thereof, must be considered as true. Whether the trial court was influenced in overruling the motion by the affidavit of Faulkner, of course, we have no means of knowing, but we see no reason why more credence should be given to the affidavits of Faulkner than to the three affidavits of appellants upon this question. If a trial court, upon a hearing of this character, has the power to determine a question of laches

upon affidavits and counter affidavits, then any defendant to a judgment might be precluded from making a defense no matter how meritorious that defense might be and no matter how diligent he might have been in making the motion after knowledge of the judgment. These questions must be determined upon the affidavits presented by the defendant or defendants to the judgment and if these affidavits show on their face a meritorious defense to the whole or part of the plaintiff's claim, and due diligence on the part of the defendants, it is the duty of the court to open up the judgment and permit the defendants to plead to the merits.

The judgment of the Circuit court is reversed and the cause remanded with directions to open up the judgment, the judgment to stand security for the debt, and grant appellants leave to plead.

Reversed and remanded with directions.

17a H

253 I.A. 631⁴

General No. 8280

Agenda No. 32

OCTOBER TERM, A. D. 1928

People of the State of Illinois, ex rel Aloysius McLean
and Hiram L. Deal, Appellees,

vs.

W. W. Bradford, James Lyles and A. T. Clower,
Drainage Commissioners, Appellants.

Appeal from Circuit Court, Christian County

ELDREDGE, J.

It appears from the briefs and arguments filed by the respective parties to this appeal that the action below was a proceeding in mandamus brought by relators to compel the commissioners of Drainage District No. 2 in King Township, Christian County, to construct a system of drains and ditches adequate and sufficient to furnish suitable outlets for the drainage of the lands of the relators and other lands in said district. It appears further from the arguments of counsel that an amended answer was filed to the petition and an amended replication was filed to said answer, to which a demurrer was overruled, whereupon appellants filed a rejoinder to the replication, to which a demurrer was sustained and thereupon the respondents, abiding by their rejoinder, the court entered a judgment in accordance with the prayer of the petition. Counsel for appellees raised the point that this court has no jurisdiction of this appeal

because no judgment is shown by the record. The court record contains the usual placita and also the following: a copy of the petition for mandamus; copy of the summons and the return thereon; a rule on the respondents to answer the petition; the answer of respondents; a demurrer to the answer; an order showing the answer was withdrawn and a motion to strike the petition from the files; an order denying motion to strike the petition from the files and that the answer was refiled and the demurrer to the answer refiled; an order sustaining the demurrer to the answer and leave to file an amended answer; the amended answer; a replication to the amended answer; an amendment to the replication; a demurrer to the replication; a rejoinder to the replication. The record then concludes as follows: "Order in accordance with the judgment and minutes of April 26, 1928 is filed and approved."

The record does not show that any demurrer to the rejoinder was filed nor the action of the court thereon nor does it show what disposition was made of the demurrer to the replication. No judgment of the court appears in the record except as above quoted. A bill of exceptions was filed which purports to show that the court overruled the demurrer to the replication and sustained the demurrer to the rejoinder and that respondents abided by its rejoinder, where-

upon the judgment rendered by the court, granting the prayer of the petition is set out in the bill of exceptions.

Orders of the court in passing upon demurrers to pleadings are a part of the record itself and cannot be made a part thereof by a bill of exceptions. A very able discussion of this question, wherein many cases in this State are cited, is found in **Burke v. C. & N. W. R. R. Co.**, 108 Ill. App. 565. In the case of **Nordhaus v. Vandalia R. R. Co.**, 242 Ill. 166, the Supreme court said: "The decision of the court on the demurrer was a part of the record without a bill of exceptions and was not properly included in the bill."

The record in the case of **City of Alton v. Heidrick**, 248 Ill. 76, contained the following order: "December 7th, 1908. The court now being fully advised in the premises sustains said motion to dismiss; appeal prayed to Supreme Court; bill of exceptions; thirty days; no bond." In commenting upon the above words, the court held: "The entry which we have quoted above is not a judgment at all. It is apparently a mere memorandum of the judge, probably entered in his docket as a memorandum from which a formal judgment might be written up. While it is true, as this court held in **Wells v. Hogan, Breese** 337, that no particular form is required in

proceedings of a court in order to constitute them a judgment, still it is necessary that there should be an entry containing the essential elements of a judgment which shows that the court finally disposed of the case."

The words used in the case at bar could not, by any possibility, be construed as a judgment. The record in this case does not even show that any demurrer was filed to the rejoinder. The purported judgment does not show in whose favor it was entered or what it was in any particular. The certificate of the clerk appended to the alleged record is, "that the foregoing is a true, perfect and complete copy of the pleadings, motions, court orders and bill of exceptions." It is apparent that it is not a true and complete copy of any these things. The record, not showing that any final judgment was rendered in the court below this court has no jurisdiction of the cause on this appeal and the appeal is dismissed.

Appeal Dismissed.



1827
253 I.A. 632¹

General No. 8286.

Agenda No. 36

OCTOBER TERM, A. D. 1928

First National Bank of Ava, Illinois, Appellee,

vs.

S. E. Roley, Mae Roley, Clem Roley, J. A. Roley, and
A. C. Mautz, (Appellant)

Appeal from Circuit Court, Shelby County.

ELDREDGE J.

A judgment by confession was entered in favor of appellee in vacation in the Circuit court of Shelby County for the sum of \$3,872.44 and costs, on May 26, 1928, against S. E. Roley, Mae Roley, Clem Roley, J. A. Roley and A. C. Mautz. The promissory note is in the usual form with power of attorney to confess judgment. It is signed at the bottom by S. E. Roley and Mae Roley. On the back of the note appear the signatures of Clem Roley, J. A. Roley and A. C. Mautz. The defendant, A. C. Mautz, who is the only appellant here, entered a special and limited appearance in the trial court for the sole purpose of docketing the cause and presenting his motion to open, vacate and set aside the judgment entered by the Clerk of said court, by confession in vacation, against him. Upon a hearing the trial court denied the motion to vacate and set aside the

judgment, but ordered that it be opened up, the same to stand as security, and the defendant Mautz ruled to plead by a day certain.

The same questions arise in this case as arose in the case of the **First National Bank of Ava, v. Yahey, et al**, ——— Ill. App. ———. In accordance with the conclusions therein announced the judgment of the Circuit court is reversed and the cause remanded with directions to sustain the motion of appellant and to vacate and set aside the judgment entered in the Circuit court.

Reversed and remanded with directions.

17a

25-11-32²

General No. 8287

Agenda No. 37

OCTOBER TERM, A. D. 1928

First National Bank of Ava, Illinois, Appellee,

vs.

Chas. W. Wilson and A. C. Mautz, (Appellant.)

Appeal from Circuit Court, Shelby County.

ELDRIDGE J.

A judgment by confession was entered in favor of appellee in vacation in the Circuit court of Shelby County for the sum of \$3,292.96 and costs, on May 26, 1928, against Chas. W. Wilson and A. C. Mautz. The promissory note is in the usual form with power of attorney to confess judgment. It is signed at the bottom by Chas. W. Wilson. On the back of the note appears the signature of A. C. Mautz. The defendant, A. C. Mautz, who is the only appellant here, entered a special and limited appearance in the trial court for the sole purpose of docketing the cause and presenting his motion to open, vacate and set aside the judgment entered by the Clerk of said court, by confession, in vacation, against him. Upon a hearing the trial court denied the motion to vacate and set aside the judgment, but ordered that it be opened up, the same to stand as security and the defendant Mautz ruled to plead by a day certain.

The same questions arise in this case as arose in the case of the **First National Bank of Ava. v. Yakey, et al**,Ill. App..... In accordance with the conclusions therein announced the judgment of the Circuit court is reversed and the cause remanded with directions to sustain the motion of appellant and to vacate and set aside the judgment entered in the Circuit court.

Reversed and remanded with directions.

253 I.A. 632³

General No. 8288

Agenda No. 38

OCTOBER TERM, A. D. 1928

Frank Owens, Appellee,

vs.

C. A. Page, Appellant

Appeal from County Court Sangamon County

ELDREDGE J.

This case originated before a justice of the peace and an appeal taken to the County court of Sangamon County, where, upon a trial, appellee recovered a judgment against appellant for the sum of \$300.00.

Frank Owens, appellee, sued C. A. Page, appellant, for services and labor performed on the building of appellant, also for work, labor and materials for repairing a popcorn machine which appellee claims he laid out in repairing the machine, which he testified was turned over to him by appellant in part payment for his services for his work on the building. Appellee testified that he performed labor on the building to the value of \$121.00, and that he performed \$310.00 worth of work on the popcorn machine, which afterwards turned out to be the property of appellant's wife and which was taken away from him by replevin. Appellant testified that he did not employ appellee to do any work for him on the building and also denies that he gave him the popcorn machine for his

services. There is a conflict of the evidence on the question of whether appellee did the work for appellant or for appellant's tenant but that question is settled by the verdict of the jury. It is clear, however, that the liability of appellant was only for the work which was performed on the building and from appellee's own testimony that did not exceed \$121.00. Appellee cannot recover, however, in an action of assumpsit, for the work he did in repairing the popcorn machine, which was the property of appellant's wife. If he has any remedy in regard thereto it would be an action of tort based on deceit.

The judgment herein should be reduced to \$121 and it is ordered that if appellee shall remit \$179.00 from the judgment within twenty days a judgment for \$121.00 will be affirmed, otherwise the judgment will be reversed and the cause remanded to the Circuit Court.

253 I.A. 6324

General No. 8291

Agenda No. 41

OCTOBER TERM, A. D. 1928

Amelia G. Montgomery, Appellee,

vs.

The Wabash Railway Company, a Corporation,
Appellant.

Appeal from Circuit Court Macon County.

ELDREDGE J.

Amelia G. Montgomery, appellee, recovered a judgment for \$5500.00, against The Wabash Railway Company, appellant, in the Circuit court of Macon County.

The cause of action was for personal injuries received by appellee resulting from a collision with a train of cars of appellant, through the negligence of the latter. The original declaration consisted of four counts and in each count the allegation in regard to the exercise of due care by appellee was substantially the same. In the first count it is set out as follows: "And while the plaintiff with all due care and diligence, was then and there driving said automobile across said railroad right-of-way, at said crossing, and upon said public highway there, defendant's train struck said automobile" etc. A special demurrer was filed to these counts and sustained on the ground that the allegation in regard to the due care exercised by the plaintiff was confined to the time of the accident

when it should have included also the exercise of such care immediately prior to the accident. The plaintiff thereupon, by leave of court, amended each count to obviate this objection. To the amended counts the defendant filed a plea of the general issue and several special pleas of the statute of limitations, in which it is averred that the cause of action presented by the amended declaration did not accrue within two years of the time of making said amendments. The trial court sustained a demurrer to the special pleas of the statute of limitations. It is urged by appellant that the original declaration set out no cause of action and therefore the amended declaration presents a new cause of action which was not filed within the limitation period. This contention cannot be sustained. It was held in the case of **New Staunton Coal Co. v. Fromm**, 286 Ill. 254: "It is the settled doctrine of this court that if an original declaration is filed in apt time, stating a cause of action, though imperfectly and defectively, subsequent amendments, though filed after the Statute of Limitations has run, will not be barred thereby if they amount to no more than a restatement, in a different or better form, of the cause of action originally declared on. **Swift Co. v. Gaylord**, 229 Ill. 330; **St. Louis Merchants' Bridge Railway Ass'n v. Schultz**, 226 id. 409; **McInerney v. Western Packing Co.** 249 id. 240; **Vogrin**

v. **American Steel Co.** 263 id. 474." A verdict will aid a defective statement of a cause of action by supplying facts defectively and imperfectly stated or omitted which are within the general terms of the declaration. **Brunhild v. C. U. T. Co.** 239 Ill. 621; **Grace & Hyde Co. v. Sandborn**, 225 Ill. 138; **Sargent Co. v. Baublis**, 215 Ill. 428. In the case of **Chicago v. Lonegran**, 196 Ill. 518, the rule in regard to the curing of a defect in a declaration by verdict is declared as follows: "Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue formed be such as necessarily required, on the trial, proof of the fact so defectively or imperfectly stated or omitted, and without which it is not to be presumed the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict." The original declaration in this case, if no demurrer had been filed thereto, would have been sufficient to have sustained the cause of action after verdict. If a declaration be defective, yet states a cause of action which will be sustained after verdict, then the defense of the Statute of Limitations cannot be sustained to an amendment to the declaration correcting the defect on the ground that the amended declaration sets out a new cause of

action. The case of **Chicago City Ry. Co. v. Cooney**, 196 Ill. 466, is directly in point. It is there held: "Appellant's first assignment of error is, that the trial court erred in sustaining the plaintiff's demurrer to its plea of the Statute of Limitations. It is contended that the original declaration was defective because it lacked the allegation that the plaintiff was exercising due care for her own safety, and for that reason stated no cause of action, and that the cause of action stated in the amended declaration was barred by the statute, it having been filed more than two years after the cause of action accrued. That the original declaration stated a cause of action, though defectively, clearly appears, for the reason that it would have been sufficient after verdict, on motion in arrest of judgment or on error. (**Illinois Central Railroad Co. v. Simmons**, 38 Ill. 242; **Cox v. Brackett**, 41 id. 222; **Gerke v. Fancher**, 158 id. 375 See, also, **Consolidated Coal Co. v. Scheiber**, 167 Ill. 539.) The cause of action stated in the amended declaration was identical with the one stated in the original declaration, and the amendment amounted only to a re-statement of the cause of action, and not to a statement of a new cause of action." In that case there was an entire absence of any averment of due care on the part of the plaintiff.

It is alleged in the first, third and fourth counts, in substance, that the plaintiff was driving and operating an automobile in a northerly direction along a certain highway or public street in the City of Decatur, known as north McClelland Avenue and extending north from West Eldorado Street to West King Street at a point where said North McClelland Avenue intersects with the right-of-way of the defendant and that while she, with all due care and diligence, was then and there driving said automobile across said railroad right-of-way at said crossing and upon the public highway there she was injured. It is claimed that this allegation declares that the plaintiff was injured within the City of Decatur and appellant offered an ordinance of the City fixing the boundary lines thereof for the purpose of showing that the limits of the city terminated twenty-two feet south of where the accident occurred and therefore it happened outside of the city and that there was a fatal variance between the allegations of the declaration and the proofs. The court sustained an objection to the ordinance on the ground that it was immaterial. While it is true that it is alleged she was driving the automobile along a public street in the City of Decatur in Macon County, known as North McClelland Avenue, to a point where said North McClelland Avenue intersects the right-of-way of appellant, yet it

is alleged that she was injured while driving said automobile across said railroad right-of-way at said crossing and upon the public highway there. The proof shows that part of the right-of-way of appellant lies within the city limits and part of it out of the city limits. The transfer track of appellant is within the city limits while the south rail of the main track of appellant twenty-eight feet north thereof according to the ordinance offered in evidence but not admitted would be twenty-two feet north of the city limits. The proof showed that appellee did approach the right-of-way of appellant over North McClelland Avenue and passed over part of the right-of-way within the city limits. After verdict the allegations of a declaration are construed most favorably to the pleader and the allegation that appellee was injured while driving across said railroad right-of-way at said crossing and upon the public highway there, is not necessarily an averment that she was injured within the city limits of Decatur. Furthermore since the passage of the public Utilities Act and the Commerce Commission Act, cities have no power to regulate the operation of trains within its limits. **City of Witte v. C. C. & St. L. Ry. Co.** 324 Ill. 494. This action is based upon the failure of appellant to comply with its common law duties and those imposed upon it by statute. In our

opinion it was immaterial whether the accident happened within or without the City of Decatur, as in either case the duty of appellant and the care required of it in the operation of its trains depended solely on the circumstances surrounding the crossing, including the amount of traffic, obstructions to the view and other facts. In other words, the duty of a railroad company in approaching a public crossing depends upon the circumstances surrounding the crossing and this duty is the same where the circumstances are the same, whether the crossing be within or without the city limits.

It is next urged that the court erred in not sustaining appellant's motion made at the close of plaintiff's proofs and at the close of all the evidence in the case to exclude the evidence and direct the jury to render a verdict in favor of appellant on the ground that appellee had not proven her case by a preponderance of the evidence. A trial court has no power to weigh the evidence and determine with whom the preponderance thereof lays. If there is any evidence which, with all the legitimate conclusions that can be drawn therefrom, which fairly tends to support a plaintiff's case as set out in the declaration, the case must be submitted to the jury whether such evidence is weak or strong. **Libby, McNeill & Libby v. Banks**, 209 Ill. 109. The evidence in this case tends to prove

that the right-of-way of appellant at the place of the accident extends east and west. North McClelland Avenue runs north and south and as it approaches the right-of-way it first intersects the right of-way and tracks of the Illinois Traction System extending also east and west. It then enters the right-of-way of appellant and first passes over one of the latter's railroad tracks known as the Wabash transfer track. The distance between the center of the track of the Illinois Traction System and the center of the transfer track is 16.8 feet. The rights-of-way of these two railroad companies adjoin and their tracks run parallel to each other. About twenty feet north of the transfer track is the main track of appellant which also parallels the other two tracks. Over each of these tracks is a plank crossing. The plank crossing over the Wabash transfer track is several feet west of that over the track of the Illinois Traction System and the plank crossing over the Wabash main track is several feet west of that over the transfer track so that a person crossing these tracks on the roadway thereover must proceed in a somewhat northwesterly direction. South of the Illinois Traction System track and on the east side of North McClelland Avenue is a one story frame building used as a grocery store. On the west side of this grocery store is a concrete sidewalk five feet wide and near the

north end thereof is a gasoline pump. Surrounding this building is a picket fence two and one-half feet high, except on the north side where there is a roofed porch six and one-half feet wide, the roof being supported by five pillars. East of the railroad crossing are several telephone poles and poles used by the Illinois Traction System. Two witnesses testified that at the time of the accident a freight car and six or seven coal cars were standing on the passing track, the west end of the freight car being fifteen feet east of the plank crossing on said track. There was evidence that no whistle was blown or other signal given of the approach of appellant's train from the east on the main track. Appellee testified that as she approached these tracks she stopped her automobile and looked east and west to see if any train was approaching and seeing none and hearing no warning signals she drove slowly forward and that she did not see or hear any train until she attempted to pass over appellant's main track when her automobile was struck by a train coming from the east. There was also evidence that the train was running between thirty-five and forty-five miles per hour and that the crossing in question was more or less extensively used by the public. There were no gates, flagman or automatic signals of any kind at the crossing. There was the usual conflict in the evidence



as to the giving of the warning signals and as to the speed of the train and the distance at which the train could be seen by a person passing over the crossing. Under these circumstances it was a question of fact for the jury to determine whether appellee exercised due care in driving her automobile over the crossing and whether appellant was guilty of the negligence charged in the operation of its train.

Appellant made a further motion at the close of the evidence introduced by appellee to exclude all the evidence with reference to the poles or location of the freight cars on the passing track as being at variance with the allegations in any of the counts of the declaration, there being no allegations therein of the presence of any cars, poles, or other obstructions other than the buildings. This motion the court also denied. A plaintiff does not have to allege all the evidentiary facts which are expected to be proven. The evidence was competent as showing the condition existing in determining whether plaintiff exercised due care under the circumstances.

The criticism made to the second, third and fourth instructions given on behalf of appellee is to the effect that they refer to the allegations in the first, second and fourth counts of the

amended declaration and attempt to enumerate them but leave out some of the material allegations. What material allegations were omitted have not been brought to our attention but we have carefully read these instructions and fail to see that any material allegation in any of the counts has been omitted. Criticism is also made of the fifth instruction which informs the jury as a matter of law that the burden of proof is upon the plaintiff and it is for her to prove her case by a preponderance of the evidence, still, if the jury find that the evidence bearing upon the plaintiff's case preponderates in her favor, although but slightly, it will be sufficient for the jury to find the issues in her favor. This instruction has been held in the case of **Reivitz v. Chicago Rapid Transit Co.**, 327 Ill. 207, to be argumentative and confusing. It has been given in a great many cases and had become what is commonly known among the legal profession as a "stock instruction". It, however, should have been refused as it also has a tendency to lessen the degree of proof required of the plaintiff to prove her case. Several instructions informed the jury that they could not find a verdict for the plaintiff unless they believed from the evidence she had proved her case by a greater weight or preponderance of the evidence, and we do not believe they could have been misled as to the true rule in regard to

the preponderance or greater weight of the evidence and consequently the giving of the instruction was not reversible error. What we have heretofore said in this opinion disposes of the criticism made to instruction No. 7. Instruction No. 8 is an abstract proposition of law stating the statutory duty of a railroad company in sounding a bell and blowing a whistle when approaching a highway crossing. Abstract propositions of law as a general rule should not be given unless the law stated is applied to the facts in the case.

The third instruction given by the plaintiff, however, correctly applied this law to the facts and no harm could have resulted to appellant by the giving of the eighth instruction. Instruction 9 informs the jury that if they find the issues for the plaintiff then it will be their duty to assess plaintiff's damages and they should assess her damages at such sum as they may believe, from all the evidence in the case, will compensate her for the damages sustained by her. The criticism of this instruction is that it should have read, "will compensate her for the injuries sustained by her". This is technically correct but the jury were informed by a number of instructions that the plaintiff was attempting to recover damages for the injuries received by her and the jury could not have been misled by this instruction. It is our opinion there was no error of sufficient gravity in the giving of instructions for the plaintiff

as should cause a reversal of the judgment.

There is no serious contention that the modifications made by the court to several of the instructions offered by appellant were improper. Appellant offered seventeen instructions, thirteen of which were given as offered and the remaining four were slightly modified by the court by inserting proper words so as to instruct the jury that they should make their findings of fact "from all the evidence" which was proper.

The judgment of the Circuit court is affirmed.
Affirmed.

222 H

253 I.A. 632⁵

General No. 8244

Agenda No. 6

OCTOBER TERM, A. D. 1928

The People of the State of Illinois, Defendants in
Error,
vs.

William Coffman, Plaintiff in Error.

Error to the County Court of Morgan County
SHURTLEFF, J.

Information was filed in the County Court of Morgan County against plaintiff in error, charging him with having violated the Prohibition Act. There were seven counts in the information, charging various sales of intoxicating liquor and charging unlawful possession of intoxicating liquor by plaintiff in error, with the intent to sell. There was a trial by jury and verdict, finding plaintiff in error guilty under the fourth count in the information charging unlawful possession with the intent to sell. Motion for new trial was overruled and plaintiff in error was sentenced to commitment at the Illinois State Farm at Vandalia for a period of four months. Plaintiff in error has sued out this writ of error.

The only question of law raised upon this record is an assignment of error that the court refused to permit plaintiff in error, on the second day of the trial after the jury had been empaneled and sworn and witnesses had testified, to file a petition to quash a search warrant and suppress evidence that had been taken by the officers under the search warrant.

On January 16, 1928, before the commencement of the trial plaintiff in error made a verbal motion in court to quash the information and to impound the evidence which was secured under

the search warrant. No proofs were submitted and the motion was denied. On the following day, in the midst of the trial, plaintiff in error asked leave to file a written petition, under oath, asking to impound evidence, and the substance of the petition was that the search warrant recited plaintiff in error's residence as 226 East Morgan Street, in the City of Jacksonville, in said county, when plaintiff in error in fact, at the time said search warrant was issued, resided in a double house at 228 East Morgan Street, being the premises said officers searched under said writ. From the abstract of the proceedings it does not appear that the court permitted the petition to be filed, and after some testimony was heard thereon, the petition was denied. In this there was no error: **The People v. Brocamp**, 307 Ill. 448; **The People v. Castree**, 311 id. 397.

We have read the testimony and cannot say that the jury was not warranted in finding plaintiff in error guilty beyond a reasonable doubt from the proofs submitted.

Finding no error in the record, the judgment of the County Court of Morgan County is affirmed.

Affirmed.

23a F
253 I.A. 633

General No. 8250

Agenda No. 12

OCTOBER TERM, A. D. 1928

The People of the State of Illinois, Defendant in Error,

vs.

Omer Chamberlain, Plaintiff in Error.

Error to DeWitt County Court

SHURTLEFF, J.

Plaintiff in error and one Grace Sterling were indicted by the grand jury in DeWitt County, oa. to wit, January 9, 1926, charged with having lived in an open state of adultery in said county, plaintiff in error then and there having a wife other than the said Grace Sterling, then living. The cause was once submitted to a jury resulting in a mistrial. Thereupon plaintiff in error was tried separately by a jury, resulting in a verdict of guilty and judgment, and plaintiff in error sued out this writ of error to reverse said judgment.

Plaintiff in error was a farmer, residing with his wife on a farm, which he owned, about two miles west from the city of Clinton. He owned another farm about three miles southwest from his "home farm," which was called his "South" farm and he had stock upon and managed both farms.

Grace Sterling was divorced from her husband, Ernest Sterling, on May 17, 1923, and in 1924, 1925 and until the spring of 1926 was living in the home of her former husband, Ernest Sterling, at 617 South Mulberry Street, in the City of Clinton, with her child Robert Sterling, born in lawful wedlock with Ernest Sterling on March 6, 1922. In the spring of 1926 Grace Sterling moved to the south farm of plaintiff in error and occupied the

dwelling house upon that farm with her minor child, about four years of age. There is no proof in the record that Grace Sterling ever remarried after her divorce, yet in the month of August, 1927, she was taken to the Brokaw Hospital at Bloomington where she was delivered of a child on the 24th of that month. The minor child accompanied her to the hospital. There is some proof in the record that no arrangements having been made at the hospital for the minor child, a telegram was sent to plaintiff in error by Grace Sterling, reading: "Come Brokaw Hospital," signed "G" and that later in the same day plaintiff in error appeared at the hospital and took the child away. The original of the telegram is produced and proofs furnished that it was written by Grace Sterling. The witness who telephoned the identical message to the Telegraph Company is produced and plaintiff in error repaired to the hospital. There was no error in the admission of this testimony. Although the date of the offense is charged under a videlect, it apparently was the purpose of the pleader to charge that the offense was committed at the South Mulberry Street home. This would not be conclusive. Plaintiff in error urges that the proofs submitted if taken as true, do not constitute an offense under the statute and it will, therefore, be necessary to set out and consider the facts or proofs upon which the jury based its verdict.

Numerous witnesses living in the vicinity of 617 South Mulberry Street testified that plaintiff in error came to the home of Grace Sterling frequently, and the witness Crawford testified: I would see him drive in and visit, I suppose. I don't know how many times a week on an average this would happen—every day. It was every day. He generally come in about six in the morning or six-thirty and generally stayed until about ten or eleven, and sometimes back at noon and stayed until one, and sometimes he would be back every hour. Sometimes I have counted as many as



seven times a day, coming and going. I saw him there of an evening. Sometimes he would drive in at about six and sometimes about seven — different times. I saw him stay there a lot of times after ten and eleven. I noticed the car being there at night, and being in the same position the next morning. That happened several times. I saw him bring milk, chickens and things like that—vegetables and things from the farm. I saw Mrs. Sterling have a baby there. He was a baby when they moved there, I judge about two years old, may be more. He wasn't walking when they moved there. He must be about five years old now. I heard Mr. Chamberlain playing with Bobby, and I have heard him say after the baby would run off, "Come back or Daddy will whip," and such as that. I have never observed anything with reference to the actions of Mrs. Sterling and the defendant.

These acts occurred during the year 1925. The witness Tossie Wood testified: In the year 1926 Grace Sterling lived the first house south of us in this county and state. In the year 1926 I saw Omer Chamberlain at that house. I just saw him come and go. Unless they had quarrelled, he was there every day, or sometimes two or three times a day. I have heard **them** quarrel. One time he ran over in yard. I don't remember if she said anything at that time in his presence. He was asking her for some change. He had given her some money or something, and he wanted the change back. All I know is that he just wanted his change back. I saw him bring food supplies there. I saw him bring milk and canned fruit and sometimes loaves of bread. I have seen him there after night, and I have seen him leave there early in the morning—real early in the morning. Sometimes he would leave his car out in front in the road and sometimes he would drive it up in the driveway. He used more than one door to the house. Sometimes he would come.

in at the front and sometimes back door. I don't remember any conversation that I ever heard him have with the boy Bobby.

Mrs. Ed Luker testified: I live one mile west of Clinton. Omer Chamberlain lives about three-fourths of a mile west of us. In 1926-27 we lived in the house directly across the road from his place. During that time I have seen Mrs. Grace Sterling there at his place. I don't know how often. I saw her there several times, but I don't know how many. He would bring her. I saw her wash windows one time, but no other work that I know of. I saw her go in the house, but don't know how many times. No one was living there besides Omer at that time. I have seen Mrs. Chamberlain out there at times. Mrs. Chamberlain and Mrs. Sterling were there, one about as much as the other. During that time I saw Omer come and go. I did not observe whether he drove out there of a morning.

Ed Luker testified: I live a mile west of Clinton, and I am the husband of the lady who just testified. During the years 1924-25 and '26, I lived directly across the road from Omer Chamberlain. During that time I observed Grace Sterling at his place several times. I don't know that I saw her doing anything but just coming and going. She went in the house when she went there. Mrs. Chamberlain was not staying there at that time. I saw them come and go together in his car. I saw the boy, Bobby, out there. I have seen him there all times of the day. I have seen them come out to the place together in the morning probably about ten o'clock.

And on cross-examination Luker stated: At that time Omer Chamberlain lived just across the road from me. I lived on the Sheeny place west of town in 1925-26. During all that time Omer Chamberlain lived right across the road from me. When Mrs. Sterling came out there I didn't see anything wrong in their actions. She came out there and would go away. I never knew of her to stay all night there. I don't know if she worked or not. During all that time Omer made his home out there and lived there.

Carl Anderson testified: "I live about three and one-half miles southwest of town in Clintonia Township. I know Grace Sterling when I see her. Since she moved out there is the first time I knew her. I bought the place where I am living I think in 1921. I live about a half quarter from the place where Mrs. Grace Sterling stays. She lives on Omer Chamberlain's farm. She has been living there since a year last spring. I have seen Omer Chamberlain there since she has been living there. He has a lot of stock there, and it naturally has to be taken care of every day when the roads are passable. He is not there every day, because the roads are impassable sometimes. He is there every day except when he has stock there, and when the roads are impassable. I have seen them go riding in that car together. There was a period of time she moved away. I don't know when it was. I didn't keep any data, or anything at all. I did not have any conversation with Omer at that time about where she was. I just knew she moved for a short period of time. I have never seen any quarrels between them out there. They have never had any trouble since she has been living there to my knowledge. I can't say I have ever seen her up at Omer's other place. I saw Mrs. Chamberlain down at the place where she is living a few times in the summer time. I know where Omer Chamberlain lives. I live about practically a mile and a half west of them—about one and a half mile northeast of the west place. I don't know how long he has lived there. I have only been in the neighborhood seven years. He has lived there all that time. I have seen him at that place on and off all the time. He has stock there at that place too. I haven't seen Mrs. Chamberlain there lately. I have sold her some berries there in the last three or four years.

Sometimes plaintiff in error's "south" place was called the

"west" place. Edwin Blue testified: I live in Clintonia Township, DeWitt County, Illinois. I live probably two miles or two miles and one-half northeast of the place known as the west farm of Mr. Chamberlain. I have been by there nearly every day this past summer. Mrs. Sterling is living there. She has been living there probably a year. So far as I know she is the only one living there that I saw. I have never seen the defendant living there that I know of. I have seen Omer there at the west place several times; I couldn't say exactly. Most of the time he was out about the barn with some stock. I also saw him in the yard.

When plaintiff in error went to the Brokaw Hospital he stopped at the desk and inquired for Mrs. Sterling's room and said he had come for the little boy. The foregoing is the substance of the testimony offered and with its most salient points, upon which the record of conviction stands. Plaintiff in error offered witnesses who testified that during all of the times mentioned plaintiff in error was living with his wife upon his farm about two miles west from Clinton, where he took his meals, slept nights and had his home. It further appears from plaintiff in error's witnesses that Grace Sterling had been at the home farm at times performing various services and cleaning, and when plaintiff in error's wife was there. It further appears that plaintiff in error's wife had not been at the farm a portion of the last year preceding the trial, but that she was there at the farm working but a week or two before the trial. There is no direct testimony tending to show any illicit relation between plaintiff in error and Grace Sterling, or any endearing term or improper conduct on the part of either other than as set forth by the witnesses. She rode with him in his automobile, leased and lived in the house on the "west" or "south" farm and at times performed services on his "home" farm and when his wife was

present. The witness Lukenbill testified to quarrels that plaintiff in error had with Mrs. Sterling and usually over change, and that once the policeman came down there when plaintiff was at the Sterling home and compelled him "to drive uptown." Plaintiff in error resented the fact that some of the neighbors talked about his visiting at Mrs. Sterling's home on Mulberry Street and stated to them with some expletives that "it was none of their business."

The question is, whether this testimony is sufficient upon which to convict plaintiff in error of living in an open state of adultery with Grace Sterling. There is no testimony in this record tending to show that the parties were living in an open state of adultery at any time at the "west" farm or at the "home" farm or at any place unless the offense was committed at 617 South Mulberry Street in Clinton. There is no testimony in the record that Grace Sterling after her divorce ever had any illicit relation with any person except that she gave birth to a child at the Brokaw Hospital on August 24, 1927. This fixes her offense in the month of November, 1926. The only proofs tending to show that plaintiff in error was the father of the child was plaintiff in error's frequent visits at the home of Grace Sterling in the month of November, 1926. All of the testimony submitted as to acts both before and after the charge of the actual living in an open state of adultery is said to have occurred, is admitted, not to prove that the parties committed the offense or an offense at some other time, but to show the adulterous disposition and illicit relations established between them and to color the acts committed. (*Crane v. The People*, 168 Ill. 405.) In *Crane v. The People*, *supra*, Crane and Mrs. Stiles were charged with living in an open state of adultery in the City of St. Charles. They lived in the same house, they ate and traveled together but there was no proof of any illicit relation in St. Charles. The proofs did show that on a former occasion at Lake Geneva Crane was found in Mrs.

Stiles' room in a compromising position, and the court said:

"In view of the nature of the offense, and of the evidence showing how these parties lived at St. Charles, and of the circumstances under which they went there to live, it cannot reasonably be said that there was no evidence tending to prove guilt, aside from the evidence of their previous illicit relations and conduct. Such last named evidence was, therefore, properly admitted. It showed the adulterous disposition and the illicit relations established between them, and without which the evidence would probably have been insufficient."

From this it follows that there must be some proof tending to show that the relationship was adulterous and illicit. In this case The People rely upon the birth of the child and plaintiff in error's visit to the Brokaw Hospital to show that his relationship with Mrs. Sterling was adulterous and illicit. Standing alone, without the other proofs of intimacy, does the fact that Grace Sterling sent for plaintiff in error to come and get her five-year old child indicate in any manner that plaintiff in error was the father of her new born child? In such a situation, would not Grace Sterling be as liable to send for any friend as to send for the father of her child? Is that fact in and of itself, standing alone, any proof of adultery? If not, the act is not susceptible of coloring the other intimacies. If and the other intimacies may raise strong inferences of guilt but are they sufficient in fact to convict beyond a reasonable doubt?

In **Searls v. The People**, 13 Ill. 598, the following instruction was given and it was held error: "That the offense with which the defendant is charged in this prosecution is legally and sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy; that in order

to constitute this offense, even one act of sexual intercourse need not be proved by positive testimony, but that the offense is sufficiently proved by any circumstances which raise the presumption of unlawful intimacy, and sexual and adulterous intercourse."

In *Crane v. The People*, *supra*, it was held that the proofs that prior to the time of the alleged offense Crane was found in the middle of the night in Mrs. Stiles' room in a compromising attitude of dress was evidence of adulterous conduct and illicit relations and necessary to characterize their conduct in living together in the same house in St. Charles.

In *Lyman v. The People*, 198 Ill. 550, the testimony showed that the parties occupied the same room and bed at night, rode about the country together and generally followed the course of conduct toward each other which husband and wife are accustomed to follow, for about four weeks. But if it be conceded that the proofs do show an adulterous and illicit course of conduct between the parties, are the proofs sufficient to establish a living in an open state of adultery? In *Crane v. The People*, *supra*, the court, citing *Searls v. The People*, *supra* and *Miner v. The People*, 58 Ill. 59, held:

"In order to constitute this crime the parties must dwell together openly and notoriously, upon terms as if the conjugal relation existed between them.—in other words, they must cohabit together. There must be an habitual illicit intercourse between them. The object of the statute was to prohibit the public scandal and disgrace of the living together of persons of opposite sexes notoriously in illicit intimacy, which outrages public decency, having a demoralizing and debasing influence upon society. They may, indeed, live together in the same family; but if apparently chaste, regularly occupying separate

apartments, a single instance of illicit intercourse surely would not constitute the crime of living together in an open state of fornication.' This was said in commenting on an instruction which, it was said, would have authorized a conviction 'if but a single delinquency were proved, even though the parties did not live together at all.' But the rule was recognized in that case that 'from the very nature of the case the offense must generally be proved by circumstances.' We do not regard the decision in that case as in conflict with this. In the case at bar the parties charged did, as we think the evidence shows, live together openly. The outward relation was openly assumed. The jury doubtless believed that the rule of boarder was a flimsy pretext, and the only question of difficulty was whether their relations were adulterous or not. A mere act, or even several acts, of adultery, without living together, would not constitute the offense, nor would the living together without the commission of adultery constitute it."

In **Lyman v. The People**, 198 Ill. 547, the court held: "If Lyman lived with Alice in an open state of Adultery for four weeks or longer, as the evidence tends to prove, he was guilty of that offense on each day of the time. As to the allegation of time this count follows the precedent given in *Cameron on Criminal Law*, on page 19. In 2 *McClain on Criminal Law*, (sec. 1087,) speaking of living in a state of adultery, it is said it is not necessary the relation continue for any definite length of time; that it may be sufficient that it is for a day, only, if it is with an intention of continuance. We are of the opinion the court did not err in overruling the motion to quash the second count."

In **Crane v. The People**, *supra*, it was strenuously objected that the proofs did not support the verdict and the court

further said: "That the question thus raised is not free from difficulty must be apparent to anyone familiar with the evidence in all its details, as contained in this record. It is, however, clear that plaintiffs in error assumed and continued in Kane County a relation which had all the outward appearances, without being so asserted by them, of the conjugal relation. This intimacy had commenced several years before, while they were living in the City of Chicago, had constantly increased, and had been characterized by many acts occurring outside of Kane County, showing beyond all reasonable doubt, as we view the evidence, that they had committed adultery. Crane was estranged from his wife and living apart from her, and Mrs. Stiles was estranged from her husband and living apart from him, and the principal cause was the infatuation of plaintiffs in error with each other." These facts were shown by letters and specific acts and conduct.

In the case at bar there are no proofs that plaintiff in error and his wife were estranged and Mrs. Sterling was on frequent occasions performing services at the farm where plaintiff in error and his wife resided. It was shown that plaintiff in error's wife was at the farm but little during the year before the trial, but it is not shown that it grew out of any estrangement between herself and her husband. It is not shown in this record that plaintiff in error ever wrote any letter to Mrs. Sterling, made any expression of endearment, or in public, while riding together, conducted himself other than in a respectable manner. The proofs show that plaintiff in error frequented Mrs. Sterling's home, taking vegetables to her and riding with her, whether for pleasure or on some business errand the proofs do not show. Plaintiff in error was at Mrs. Sterling's home frequently during the daytime and in the evening, for what purpose the proofs do not show. The purpose is left

to conjecture and inference. Plaintiff in error's car was at Mrs. Sterling's home late at night and a witness saw the car at the same location in the morning. We may well infer and conjecture that the car remained in the same location all night, but that does not establish proof that plaintiff in error remained in Mrs. Sterling's home all night for an adulterous purpose. The proof is uncontradicted that plaintiff in error maintained his home and establishment upon his farm and continued his conjugal relations with his wife, even after Mrs. Sterling's child was born, but a man may openly maintain two establishments. The question is whether plaintiff in error did maintain openly two establishments, one for an adulterous purpose. There are no proofs that these parties ever committed adultery, except such proof be based upon the birth of Mrs. Sterling's child and plaintiff in error's visit to the hospital.

In *Crane v. The People*, *supra*, the court said: "A mere act, or even several acts, of adultery without living together, would not constitute the offense; nor would the living together without the commission of adultery constitute it." The charge is: "**the living together in an open state of adultery.**" As we view it, the charge requires two independent lines of proof. To establish: first, the proof as to adultery or illicit relations; and second, the living together in adulterous and illicit relations, openly and publicly, in the manner of conjugal relations. It is true that the proof of intimacies and opportunities may accentuate the proof of adultery and that the proof of adultery may and the fact of adultery does lead to the living in an open state of adultery; but the production of one line of proof cannot wholly supplant and take the place of the other line of proof.

Counsel for the People forcefully argue and contend that

plaintiff in error was the father of Mrs. Sterling's child, based upon the fact that she sent for him to come to the hospital and take away the older child. This fact in and of itself would be no proof of adultery unless accentuated by the proofs of the former visits by plaintiff in error to her home. It is next contended that plaintiff in error visited Mrs. Sterling's home for an adulterous and illicit purpose, for the reason that it has been shown that he was the father of her child, that being the only proof that tends to establish an adulterous relation. We cannot accede to this line of argument, and whatever may have been the conviction of the jury upon the proofs or the opinion of this court arrived at from suspicion, inference, speculation and conjecture, the proofs fall far short of establishing that these parties lived together in an open and public state of adultery, such as the Supreme Court of this State has defined as constituting the crime charged in the indictment. The question as to whether these parties committed adultery, or whether their acts and conduct was lascivious and illicit, is not a question in the case. The charge is, living in an open and public state of adultery, and this charge, in the view of this court, has not been established. It follows that the judgment of the County Court of DeWitt County should be reversed.

Reversed.

24a

H

253 I.A. 633²

General No. 8258.

Agenda No. 18

OCTOBER TERM, A. D. 1928

The people of the State of Illinois, Defendant in Error,
vs.
Charles S. Stevens and Robert Fraley, Plaintiffs in
Error.

Error to the County Court of Sangamon County.
SHURTLEFF, J.

Information was filed in the County Court of Sangamon County charging plaintiffs in error, in the first count, with assaulting Brewer Hendricks with a cane with the intent to inflict a bodily injury, no considerable provocation then and there appearing and the second count is the same as the first, except that it charges an assault was made with a pitchfork, and each count contains the usual and formal charges. There was a trial by jury, a verdict of guilty against both defendants on each count, judgment and sentence. Plaintiffs in error have sued out this writ of error to reverse the judgment.

The principal assignment of error and contention is, that the court erred in entering judgment upon the verdict inasmuch as there was no evidence to sustain the verdict as to one count as to one defendant, and as to the other count on the part of the other defendant. In other words, it is complained that the counts charge separate offenses, and contended that both defendants could not have been guilty of each. The proofs show a state of facts about as testified to by the complaining witness, Bremer Hendricks: that he lived on a farm about three miles west of the City of Auburn, Illinois; that he had known plaintiffs in error for four or five years; that Charles Stevens was a son-in-law

of Robert Fraley; that he had had some trouble with Robert Fraley in January, 1927, but it consisted of a mere argument; that on May 28, 1927, he attended a public sale held by Steve Chandler; that he went to this sale with the intention of buying a cow; that there were a hundred or more people at this sale; that while the auctioneer was selling some horses, plaintiffs in error came up behind him and attacked him; that when plaintiffs in error came up from behind him, Fraley said, "you son of a bitch, you will have to leave here," and as he turned around to throw up his hands, Fraley hit him twice over the head with a hickory cane, and Charles Stevens, without saying a word, hit him once on the right side of the face with a four-tine pitchfork; that he battled with these men and finally someone took them away and he was then taken to Dr. Deatherage's office at Auburn, Illinois, where he had his wounds treated; that Dr. Deatherage attended him for a period of about three months.

In addition, plaintiff in error Fraley testified that after the trouble at Compro he asked his son-in-law, Stevens, to protect him for the reason that "he did not want to take that off of him (Hendricks) every day." A witness further testified that Fraley and Stevens were seen talking together behind the house by themselves but a short time before the assault was committed. There was no error in the admission of this testimony. The only question is, whether the assaults were joint on the part of both plaintiffs in error or whether they were separate, independent assaults on the part of each. The testimony of Fraley and the conference between plaintiffs in error shortly before the assaults warranted the jury in finding that each plaintiff in error joined in each assault, thus rendering both defendants guilty of each assault.

In **The People v. Anderson**, 239 Ill. 168, the court held that the following instruction states fundamental principles of law often announced: "That if two or more persons are engaged in the prosecution of a felony, the acts of each in the prosecution of such felony are binding upon all, and all are equally responsible for the acts of each in the prosecution of such felony."

No authority is cited that the same rule does not apply to misdemeanors.

Some complaint is made as to instructions, but the abstract does not set out the instructions. Plaintiffs in error have merely attempted to state the substance of certain instructions. We have examined the instructions and find the assignments of error, based upon the instructions, are not sustained.

Finding no error in the record, the judgment of the County Court of Sangamon County is affirmed.
Affirmed.



253aH

253 I.A. 633³

General No. 8260

Agenda No. 45

OCTOBER TERM, A. D. 1928

Joe Hayes, Appellee,

vs.

National Life and Accident Insurance Company,
Appellant.

Appeal from The Circuit Court of Vermilion County
SHURTLEFF, J.

Part of this suit was before this court at a former term, **Joe Hayes v. National Life and Accident Co.**, 243 Ill. App. 641. The cause was commenced before a justice of the peace on September 1, 1925, and resulted in a judgment for \$72.00, which was reversed by this court in **Joe Hayes v. National Life and Accident Co. supra**. The suit was based upon a policy of insurance issued by appellant to appellee on August 25th, 1925. Later, appellee in the month of August, 1927, commenced his second suit in the Circuit Court of Vermilion County for further accrued damages, based on the same policy, and the suit was based also, in assumpsit, upon an additional policy issued on March 19, 1925, by appellant to appellee, both suits being brought to recover sums growing out of an accidental injury to appellee happening on May 29, 1925.

The first count in the declaration charges the issuing of the policy for a consideration, covering weekly indemnity for sickness and accident, agreeing to pay eight dollars per week for each day appellee, by reason of accidental injuries of which there is external evidence, should be disabled from performing work of any nature for a period of 182 days during

any twelve consecutive months. Reference is made to the policy of insurance attached to the declaration and made a part of the same, and it is further averred that after making said policy, on, to wit, May 29, 1925, appellee suffered an injury to his back at a coal mine; that due notice was given to appellant and appellant paid appellee for a part of the time disabled, but thereafter refused to accept premiums, claiming that said policy was cancelled, refused to make further payments and averred damages upon said policy to the amount of \$416.

A second count is filed, based upon the policy issued by appellant March 19, 1925, which is attached to the declaration as Exhibit B, and averred to be a part of said declaration. The count contains the same charges and allegations, based upon the same injury as set out in the first count, and avers a damage to appellee of \$1046. There is an averment of damages under the two counts to the amount of fifteen hundred dollars. Under a stipulation of parties the two suits and causes have been consolidated and were tried as one case. They cover the period from August 3, 1925, to August 24, 1927.

To the first count in the declaration appellant filed five special pleas: **first**, the general issue; **second**, that appellee was not disabled from performing work of every nature by reason of accidental injury with external evidence; **third**, that appellee did not make report to the company of disability from injuries, etc., occurring while said policy was in force and effect; **fourth**, that appellee did not furnish appellant after June 30, 1925, certificate of physician of accidental injury or disability suffered, etc., **fifth**, that in violation of requirements of said policy appellee did not furnish appellant certificates of physician after June 1, 1925, of any accidental injury or disability, etc. Special pleas to the second count; **sixth**, that appellee was not wholly

disabled and so as to prevent the insured from performing any and every duty pertaining to his business or occupation and insured was not for the entire period engaged in performing the duties of any other business or occupation and was not under the treatment of a regular physician, etc; **seventh**, that no written notice was given to the company within twenty days after the accident, as provided in the policy; **eighth**, Sets out the application made by appellee wherein it stated that he had had an injury in 1925, "sprained back," but had fully recovered in two weeks; alleges statement false and that appellee had not fully recovered; **ninth**, that in application appellee had concealed the fact that he was then carrying accident and health insurance in two other companies; **tenth**, that appellee had refused and neglected to permit an examination and had failed to comply with the provisions of the policy whereby said claim was rendered invalid, etc.; **eleventh**, that the disability occurred before the issuing of the policy etc.; **twelfth**, To the first and second counts appellant pleaded that the claim of disability was the same claim as that for which appellee instituted suit in justice court, which suit was then pending in this court.

Owing to appellee's peculiar declaration, we have set out the substance of all the pleas, some of which contain matter which is a condition precedent to appellee's right to bring suit and the basis of appellant's assignment of error that the declaration does not state a cause of action. Replications were filed to some of the pleas and issues made upon all of them. There was a trial by jury, a verdict for appellee in the sum of one thousand dollars, and the record is brought to this court by appeal for review. The assignments of error are numerous and we shall not be able to completely analyze and do justice to all.

Appellant contends that court should have instructed

a verdict for appellant; that the declaration does not state a cause of action; that the proofs submitted do not establish a liability, and that after overruling a motion for new trial the court should have arrested the judgment. This contention is based upon law and fact. There can be no question, and it is conceded by appellee, that the declaration does not charge matters of fact under the terms of the policy precedent to the right of recovery. The declaration standing alone does not state a cause of action. But appellant, by the pleas, has supplemented the issues and brought the matters precedent to the right of recovery into the case and made them a part of the issues in the case. This obviates the error. (*Miller v. Kresge Co.*, 306 Ill. 107; *Kelleher v. Chicago City Ry. Co.* 256 id. 456; *Rubens v. Hill*, 213 id. 537.)

Appellee in this suit is claiming benefits under the following condition in the policy:

“Conditions”

“2. Benefits will be paid for each day insured is by reason of accidental injuries, of which there is external evidence, disabled from performing work of any nature.”

If appellee's proofs in the case do not bring him within the provisions of the conditions named, the jury should have been instructed to find for appellant. Just what the injury to appellee was in this suit, is difficult to determine from the proofs. There was no written statement or proofs of loss. The case is argued as though that question was waived. Specifically, appellee testified: “Working at Little Vermilion loading a car; went to pick a piece of coal, throw it on the car and while I was throwing it, something pulled in my back that way. Couldn't work no more; had to quit and go out; back commenced to give me trouble so I couldn't straighten up; couldn't hardly walk; had to walk with a cane.”

This is the injury of May 29, 1925, upon which suit is brought. We have read the testimony of the witnesses for appellee, Dr. Wilson and Dr. Dixon, and get little added light as to the injury, and we have read the proofs submitted by numerous physicians for appellant. All find one or two apparently fleshy tumors of small size on appellee's back. None venture a suggestion that these tumors were caused by any injury of May 29, 1925. All with the aid of an X-Ray find a slight condition of arthritis in the bones and vertebrae which appellee's physician witnesses attribute directly to the injury; while a considerable number of skilled physicians and surgeons for appellant consider the cause more likely to have come from decayed teeth. Some of them found that appellee had badly infected teeth and tonsils.

It is insisted that the cause of injury to appellee's back or "sprained back" goes back to appellee's injury January 14, 1925, about which he testified: "Drilling a hole; had shot hole on 13. While I was under drilling, coal fell on me; sitting down on knees; throwed me this way; crouched down on my back and knocked the coal right down here on my back; coal was two feet thick, eight feet long; drilled eight and one-half foot hole so I could shovel." Following this appellee describes a further injury on January 30, 1925: "As to January 30, 1925, pushing car, started to load, something broke loose in my back; fell; couldn't move; sent me to hospital; attended by Dr. Cloyd; nine days in hospital; sent me home until he released me."

Appellee received benefits for these disabilities and immediately on March 19, 1925, upon his representations that he was fully restored to health, took out a second policy in appellant's company. We are impressed with the similarity between appellee's injuries on January 30th and May 29th, 1925. Each bear the impress of an outcropping of a former trouble and not of independent injury. Appellee's case is dependent upon his own

testimony as corroborated by Doctor Wilson and Doctor Dixon. Doctor Wilson first treated or knew of the case on July 7, 1925. Appellee's subjective statement to the doctor was that he had "a fall of coal on him in the mines in line of duty and I examined that time and found the lipoma. No pain in the upper side but the one down near spine on pressure I would get an expression of pain; found pain in lumbar region near point of scapula, upper portion spine. Objective symptoms abnormally stiff gait and flexation of the spine generally and generally in lumbar region. Pain only by solicitation and base the point of pain from the expression of face or complaint; pronounced in lower lumbar region just in two particular places; about four or five inches in upper lumbar; muscles rigid ever since I have been waiting on him; don't recall the name of the nerve. Lipoma (a fatty tumor) would always be considered of little value in any kind of trouble; no rigidity in lipoma. The objective symptoms were rigidity of spine in lumbar region, his gait, disabled from standing up straight and stooped posture abnormal. Lipoma could be rolled and move it and would give no sense of pain at all. I think it possible I testified at Industrial Commission hearing and stated I thought it was a bruise. I may have said I did not think it was a lipoma. I guess I did answer I did not think it was a fatty tumor." The witness over objection was permitted to answer that there was a direct connection between appellee's pain and stooped posture on July 7, 1925, and the hypothetical case that appellee had suffered an injury on May 29, 1925, by straining his back while lifting a heavy lump of coal in attempting to throw it on a coal car. This was error. It is interesting to note that the uncontradicted testimony shows that appellee in January, 1925, when examined for his then injury, had a lipoma about half the size of an English walnut at the right of the spinal column about at the second lumbar vertebra and another smaller one on

tenth axillary line. During this same period Doctor Wilson was making reports to the Washington Fidelity Insurance Company, on behalf of appellee, for benefits he claimed under two policies he held in that company for the same pretended injury. Eight reports purporting to be signed by Dr. Wilson in behalf of appellee, and covering the same injury commencing August 23, 1926, and running to March 14, 1927, were presented to the witness for identification on cross-examination. These reports stated uniformly that appellee was injured on May 29, 1925, "by fall of coal on him in U. S. Fuel Co. mines—sprained back." The court sustained an objection to the identification of the instruments and later to their introduction in evidence for the reason stated—that it was not cross-examination, and the reports were made to another insurance company. This was in violation of an elementary rule of evidence. Dr. Dixon did not see appellee until in August, 1926. He examined the patient four times. He had the subjective statement and over objection was permitted to state positively that the condition found—"rigidity in the back upon pressure, the facial expression showing pain, fatty tumors and stooping position in walking," was due to the injury of May 29, 1925. Dr. Dixon testified that on his examination he could detect no broken bones, no fracture. The subject of adhesions was not mentioned and upon cross-examination the witness was asked to identify a report purporting to have been signed by him under date of August 9, 1926, to the Washington Fidelity National Insurance Company, covering the same injury of the same date, and stating:

Q. "Describe injury.

A. "Fracture of the spine.

Q. "Is there external evidence?

A. "Yes.

"Q. If so what? showing adhesions?"

To this the court sustained objections for the reasons given *supra*, and the jury were denied the benefit of the contradiction. The witness testified that he never treated appellee; that when he examined him in August, 1926, he saw no discoloration except the natural color, being a colored man, on his body or back, and that he probably said then that he saw no reason for appellee's suffering pain; that he found bad teeth, broken off teeth, decayed with pus sacs at roots, and that the infection from such teeth would spread to different parts of the body. The doctor testified that he had to rely on what appellee told him then and now as to his injuries. The doctor testified that his diagnosis of appellee's case was based upon appellee's statement of his injury that a heavy weight had struck him in the back.

The doctor in testifying was particularly insulting to counsel and the court. In answer to a question as to whether a lipoma had a feeling, he replied: "That has no bearing, Mr. Hutton, on this case. I have taken my examination before and I refuse to answer your silly questions." At other times the witness, quite likely to cover his ignorance, broke forth in gusto and was not properly restrained and corrected by the court.

The proof of appellee's injuries of May 29, 1925, and of the external evidence thereof, is based upon appellee's subjective statement and a possible view of "rigidity of frame, rigidity of muscles" and "stooping posture," which may be genuine or simulated. Appellee vouches for the testimony of Doctors Wilson and Dixon and their statements that appellee stated his case to them as a "fall of coal upon his back in the mines" indicates to that extent, at least, his claim is false and fictitious.

Appellant produced men of the medical profession, H. F. Hooker, F. M. Hartsook, Melvin L. Hole, F. N. Cloyd, Robert Clements, R. M. Montford and M. A. Price, some of them of high

standing and all of them disinterested, except Doctors Cloyd and Price, who had performed some service for appellant. Each of them had examined appellee fully and applied approved tests to determine whether his claim of injury was genuine or feigned. Some of them had operated together upon appellee. The testimony shows that appellee was able to bend over and touch the floor with his fingers. When struck on the back with a feather he would straighten up and assume a very extended position, showing that he could straighten up easily. Dr. Hartsook testified that he was very sensitive and would jump and complain of pain when stroked with cotton on toothpick over dorsal and lumbar vertebrae; that it indicated hyper-sensitive condition. The doctor had him sit up pretty straight and put his hand on top of his head, exerted some pressure and struck his hand with his other hand. The doctor states if there had been an inflammatory condition on auricular surface of vertebrae causing him pain, it would have caused quite a little pain but that he did not complain. It is shown that this test, the feather test and cotton test are well known tests used among the medical profession to determine malingerers and those who feign. Dr. Hartsook further testified that when appellee's attention was distracted by another doctor appellee did not notice his hand on appellee's back where he had complained of sensitive areas. The witness did not press hard but just let the weight of his hand rest upon appellee's back. Each of the seven witnesses testified that in their opinion appellee did not suffer pain and was a malingerer and pretending his injury.

Counsel have not discussed in their briefs the law or fact as to what is required to establish external evidence of an injury or the other special clauses in the policies of insurance. Some of the matters set out were offered as proofs which are not a part of the record as proofs, and it may be there was some

testimony offered that would warrant the submission of the cause to a jury. However, from what is before us in the record, we are satisfied that the verdict and judgment are manifestly and very greatly against the plain weight of the testimony and proofs.

Many other assignments of error are pointed out. One of appellee's counsel, in examining the jurors on their **voir dire** inquired of each juror if he had ever worked for or been connected with a corporation, with an emphasis upon the subject of corporations, and with an apparent mental intimation, we gather from the abstracts and briefs, that the matter of corporations was generally "a pretty sealy piece of business" to be connected with. Through the trial the same counsel continually refers to appellant as "the corporation" over the continued objection of counsel and with the apparent consent of the court. There is no question but that counsel have the right to ask pointed questions and know the history of jurors about to be passed upon, but all that can be accomplished without injecting into the case a trial of the virtue of a public policy that permits corporations. Many of appellant's objections should have been sustained and the rule enforced. The same counsel asked the witness, Doctor Dixon:

Q. "Doctor, did you examine this plaintiff at one time for the defendant **corporation**?" This is a sample. As a side light of what took place during this trial when the same counsel, Mr. Jenkins, was arguing the case to the jury, we insert a page from the abstract as follows:

"There is no pretense in this case that Joe was entitled to anything for January 14th, 1925, nor that he is entitled to anything for the sprain of his back on January 30, 1925.

"Anyway, gentlemen, they have waived and they are estopped to deny any liability on both of these policies here in question because they have made payments, that is the law—

"Mr. Clark: Object to that remark is not being either the

law or the evidence and move that the jury be instructed to disregard it.

"The Court: The jury will be instructed to disregard anything that isn't admitted in evidence by the court.

"Mr. Clark: He is arguing the law and arguing the law from a false standpoint.

"Mr. Jenkins: Object to the remark, I am as truthful as you, Mr. Clark, and you know it.

"Mr. Clark: That is not the law.

"Mr. Jenkins: It is the law.

"The Court: Proceed with the argument.

"Mr. Jenkins: I say to you, gentlemen of the jury—if you want to make your record make it—that this insurance company has waived and are now estopped as a matter of law, not as a matter of evidence but as a matter of law—

"Mr. Clark: Object to counsel arguing the law as it doesn't exist to the jury.

"The Court: The jury will take the law from the court.

"Mr. Clark: Then I move counsel be instructed to cease that line of argument. I want a ruling on the objection to the argument.

"The Court: The objection will be sustained if counsel isn't keeping within the law.

"Mr. Jenkins: Is the court holding that isn't the law?

"The Court: The court isn't making any ruling.

"To which action of the court defendant excepts."

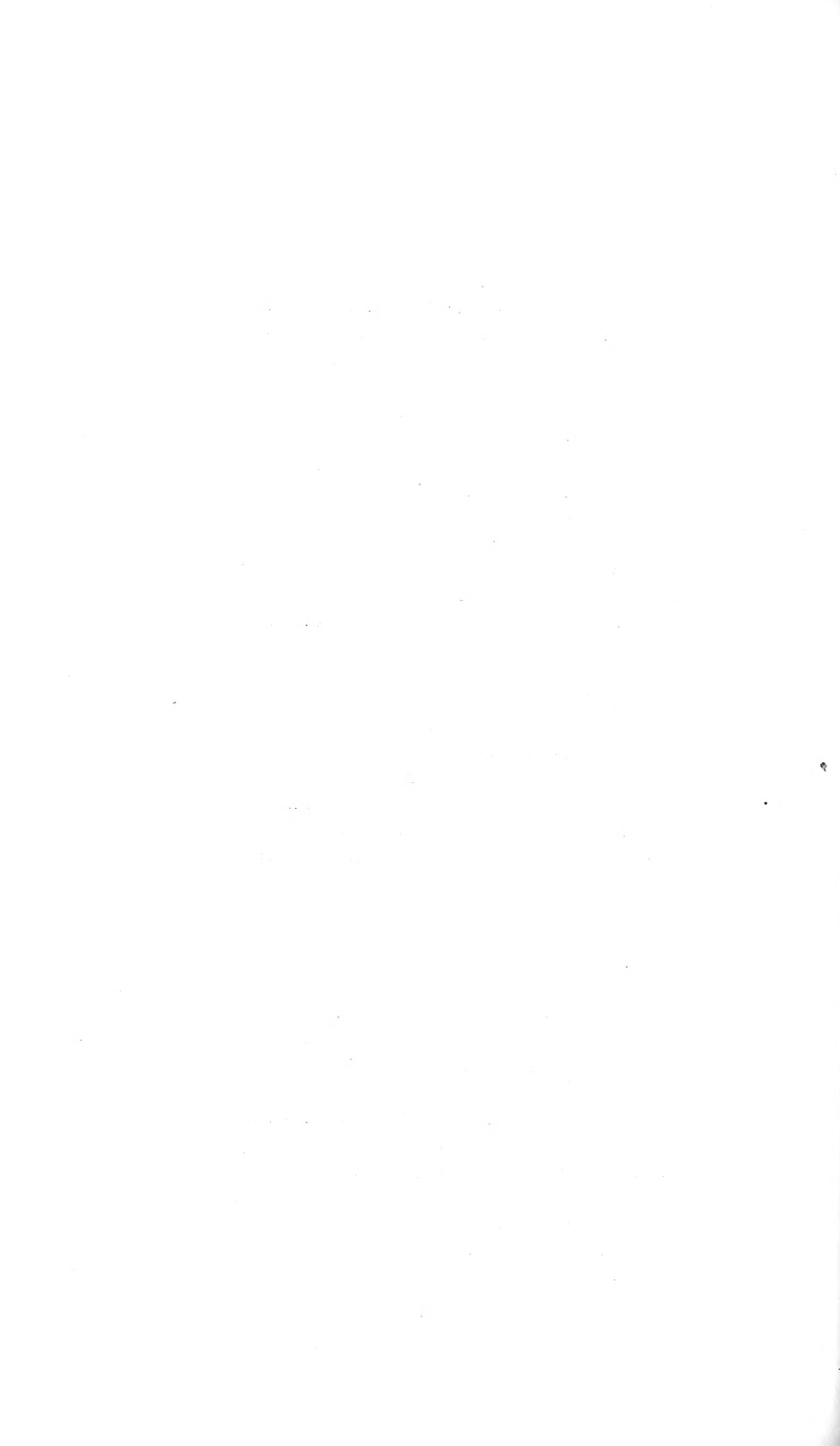
Counsel asked for no instruction to the jury embodying the statement he had made as the law, and it is not the law, especially as applied to this case. The conduct of counsel was sufficient to constitute reversible error in this case.

This court said in **Illinois Central Railroad Co. v. A. C. Seitz**, 111 Ill. App. 244: "There is enough natural and inherent prejudice in the minds of jurors against railroads and other corporations without having it augmented by direct and improper appeals calculated to arouse the sympathy, passion or prejudice of jurors. A lawyer who tries his case in a proper manner, observing the ethics of the profession, is at a great temporary disadvantage when trying a cause against counsel who resort to improper language to obtain a verdict. Verdicts thus obtained generally are and always should be short lived. Trial courts should set them aside as often as they are obtained. It is the policy of this court to discharge such misconduct on the part of lawyers by reversing judgments obtained by them."

Numerous other assignments of error are made on the exclusion and admission of evidence, the most of which are well taken. Appellant criticises the giving of nearly all of the instructions on behalf of appellee. Under the facts of this case some of them were erroneous; but to go further into the assignments made as to the evidence or the instructions would be extending this opinion to too great a length. Should the case be tried again, doubtless these errors will be corrected.

Although one of the policies upon which suit was brought provided for compensation for partial disability, yet appellant was denied the right to show that appellee had been employed at a barbecue in the City of Danville for a considerable length of time, and the case went to the jury upon the testimony that appellee was totally disabled. As Dr. Wilson testified: "I think the man has got progressively worse all the time," when in fact he may have been working in a barbecue all the time.

This court has used strong language in attempting to disclose the fraudulent practices of certain insurance companies. It owes



a like duty to prevent fraud from being practiced and imposed upon insurance companies undertaking to do a legitimate business. The corporation and the individual are and should be equal before the law.

The judgment of the Circuit Court of Vermilion County is reversed and the cause remanded for another trial.

Reversed and remanded.

26a

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253 I.A. 6337

General No. 8272

Agenda No. 27

OCTOBER TERM, A. D. 1928

Lucy Riley, Appellee,

vs.

W. G. Musser, Appellant.

Appeal from the Circuit Court of Logan County.

SHURTLEFF, J.

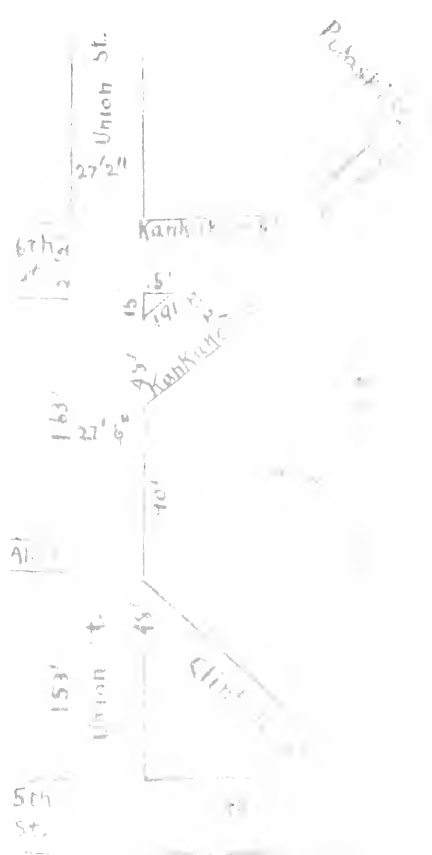
Appellee, plaintiff, brought her action in case against appellant at the September Term, A. D. 1927, of the Circuit Court of Logan County. The declaration consisted of three counts, to the first of which, setting forth an ordinance of the City of Lincoln, a demurrer was sustained, and that count had no further connection with the case. The second count charged the negligent operation of defendant's motor vehicle, and the third count charged the operating of defendant's motor vehicle at an unreasonable rate of speed having regard to the traffic and the use of the way and so as to injure the property of plaintiff then using the public street. To the second and third counts a plea of not guilty was filed, the case was tried before a jury at the January, 1928, term of said court, and a verdict returned in favor of appellee in the sum of \$1663.34. Motion for a new trial by appellant was overruled and judgment rendered for appellee in said sum and appellant has appealed to this court.

On June 15, 1927, and prior thereto, Union Street was a paved public street in the closely built up residence portion of the City of Lincoln. The paved roadway of Union Street was of the width of twenty-seven feet and two inches between curbs between Fifth Street and Sixth Street, and Fifth Street, a paved street, entered Union Street from the West. Sixth Street, also a paved

street, entered Union Street from the west and lies three hundred and twenty feet north of Fifth Street. An alley fourteen feet wide passes through the block from east to west at the center.

Kankakee Street extended from the northeast at approximately a forty-three degree angle to Union Street and the north line of Kankakee Street intersected the east line of Union Street at a point about fifteen feet south on the south line of Sixth Street, East Lincoln. The separate additions into which the city was platted at this point left a small area east of the east curb line of Union Street which was irregular in shape, the triangle which would otherwise have been formed by said street lines having its corners rounded, and this area had been improved by the city and a light post set and shrubbery planted in it. It was approximately fifty feet in circumference and in the evidence is spoken of as the boulevard or the island. Kankakee Street was paved with a brick pavement, which was on the east line of Union Street extended southward from the north curb line produced by Sixth Street to the southeast curb line of Kankakee Street, a distance of approximately ninety feet. The paved roadway of Kankakee Street was of the width of twenty-nine feet from the north curb line of Kankakee Street to the north curb line of said island, and the paved surface of Kankakee Street from the south point of said island to the corner or junction of the east curb of Union Street with the south Curb of Kankakee Street was forty-eight feet. The nearest street east of Union Street intersecting Kankakee Street at right angles was Pulaski Street, which was likewise a paved street.

We insert a map of these streets and the island, which is substantially correct, except that the map does not show the rounded corners of the so-called island.



The proofs of appellee and her witnesses tended to show:

At about eleven o'clock in the morning of June 15, 1927, appellee in her Ford touring car traveled eastward on Fifth street and turned north on Union Street and proceeded along and upon the east side of Union Street at a distance of from a foot to eighteen inches from the east curb line of Union Street. She had had eight years' experience in driving automobiles and she testified that the speed at which she traveled was ten or twelve miles per hour. She had proceeded north half a block from Fifth Street on Union Street after making the turn, when, as she approached Kankakee Street going north, she saw the appellant's car coming southwest on Kankakee Street at a distance of two hundred feet from her car. Appellant's car was at that time in front of the residence of Dr. Rembe, who resided at the corner of Pulaski and Kankakee Street. The distance from Pulaski Street to Union Street on Kankakee Street was three hundred and twenty feet. Appellee's car traveled about twenty-five feet after she saw appellant's car approaching. Appellee then brought her car to a complete stop in order to permit appellant's car to pass in front of her. She testified that appellant's car, when she first saw it traveling southwest on Kankakee Street, was about a foot from the northwest curb line of Kankakee Street and that he was traveling as if he were going to turn west out of the first turn or north of this island. Appellee testified that because appellant was to her right, in turning on Sixth Street she stopped her car to give him the right of way on Sixth Street because she thought that was the street he intended to take, and that it looked as if he was turning on Sixth Street. When she came near the island appellee threw out the clutch and brought her car to a complete stop. Her car was then located in such position that the front was within five feet of the rounded corner of the curbing of the island and within three feet of the curb line produced if said corner had not been rounded, and was about

twelve inches west of the east curbing. It was twelve feet from the island to the back of appellee's car and there was a clear space of thirty-six feet between the back of appellee's car and the southwest curb line of Kankakee Street, so that the appellant had twenty-seven feet of paved street in which to pass in front of appellee's car and thirty-six feet of paved street in which to pass behind appellee's car, and there was no other car on Kankakee Street nor on Sixth Street, nor any other obstacle to prevent appellant from so doing.

While appellee's car was standing still waiting for appellant to pass in front, appellant turned his car and instead of passing in front of appellee's car and turning into Sixth Street, swung his car off on Kankakee Street and turned on the south side of said island and within eight or ten inches of the curb on its southeast side and struck appellee's car at the right front wheel, the front of appellant's car striking the right side of appellee's car bending the front axle and the right front fender of appellee's car. The right front fender and the right front wheel of appellant's car were crushed and the radiator and front bumper of appellant's car were caved in and broken by said collision.

Appellee and her witnesses testified that appellant was traveling at a speed of twenty-five miles an hour, while it is contended that appellee's car was not going faster than ten to twelve miles an hour. Appellee, after seeing appellant's car, traveled over twenty-five feet and from all the testimony and the distances shown upon the map, must have traveled from fifty to sixty feet. Appellant testified:

"I was coming down Kankakee Street; there was a car coming South on Union Street and I checked up for this car before I went into the intersection of Union off of Kankakee, and just as I got to the intersection here came a car from the south. I was not quite in, probably about four feet onto Union Street and .

I stopped probably two feet south of the little triangular section and four feet in Union Street and when I stopped this car hit me. I didn't have time to back up. I saw Mr. Kuhl's car going south on Union Street."

In this statement of the situation appellant is not corroborated by the testimony of any witness. The statements are contradictory in substance and in detail. Appellant further testified that "his car was standing still at the place where it stopped, before the collision, not over a minute—hardly a minute, about thirty seconds." This testimony on the part of appellant specifically contradicts the testimony of the witness Kuhl, cashier of the National Bank of Lincoln, as to the location of Kuhl's car going south on Union Street, and is directly contradicted by the injuries done to appellant's car as shown by the testimony of the witnesses and the photographs of the car offered in evidence, and contradicts the testimony of three other witnesses. The jury saw and heard the witnesses. The jury saw and heard the witnesses testify and we are not disposed to interfere with their finding of the fact.

But appellant contends that appellee was guilty of contributory negligence, inasmuch as the statute provides that upon approaching an intersection all drivers shall give the right of way to vehicles approaching from the right, citing: **McCarthy v. Fadden**, 236 Ill. App. 300; **Lenartz v. Funk**, 224 id. 180; **Partridge v. Eberstein**, 225 id. 213; and **Salmon v. Wilson**, 227 id. 288.

In **Heidler Company v. Wilson & Bennett Company**, 243 Ill. App. 89, the court in discussing **Partridge v. Eberstein**, *supra*, said:

"In the same case the court also said that a vehicle might be said to be approaching an intersection from the right, within the meaning of the statute, and so entitled to the right of way over one approaching the intersection from the left, when the driver of the latter, in the exercise of due care, would or should

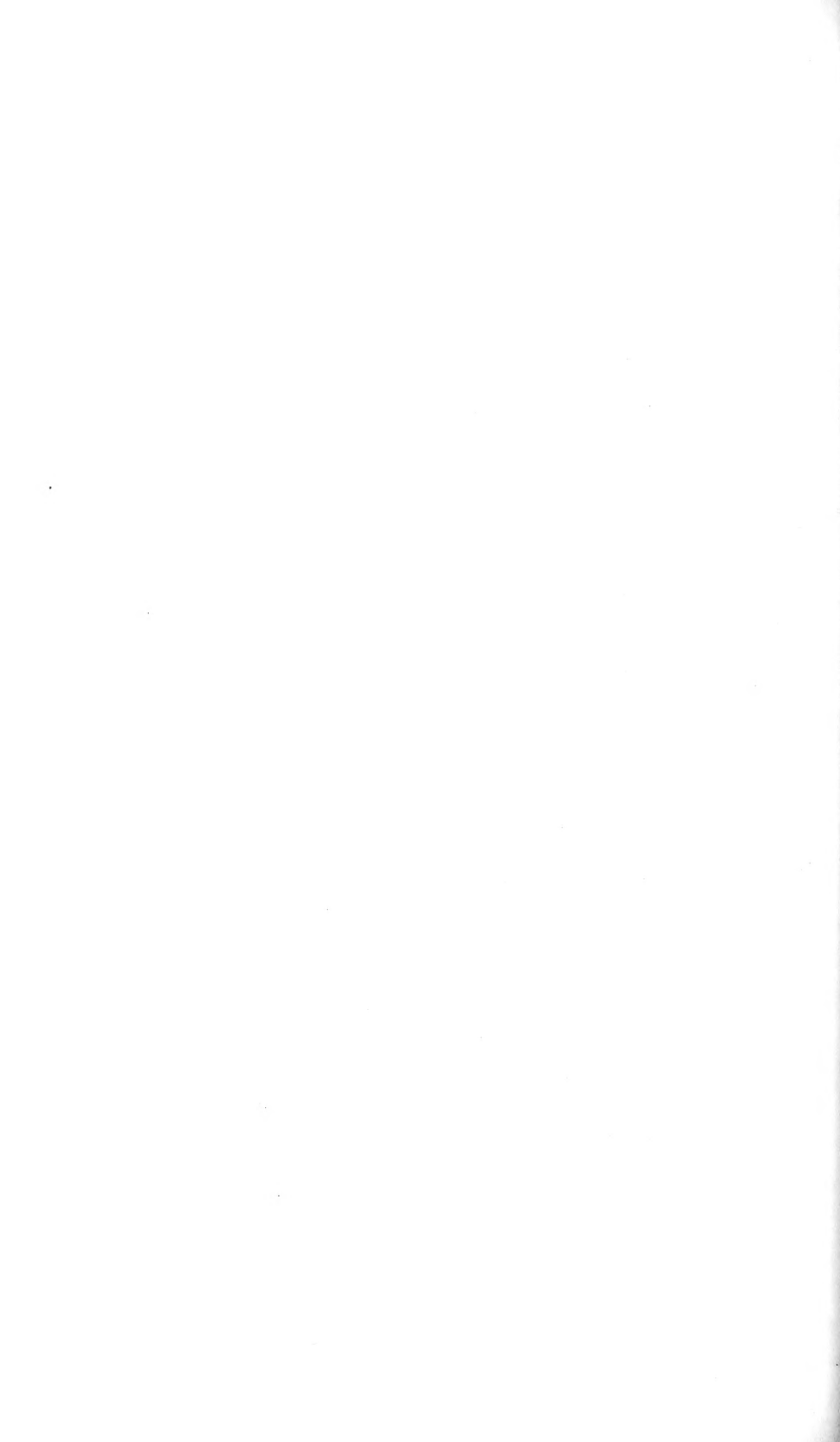
see that, unless he yielded the right of way, the vehicles would or might collide. In passing on the question of whether due care was exercised by the drivers of the respective cars involved, two principal elements must be taken into consideration, namely, the relative positions of the two cars with respect to the intersection and their respective rates of speed. Usually the question of whether, in view of the relative positions of the two cars, with respect to the intersection, and their respective rates of speed, the driver of the car approaching the intersection from the left, should have seen that the cars would or might collide, unless he yielded the right of way, is one of fact for the jury to determine."

The court further say, page 95: "Such would be the situation, in our opinion, where, as in the case at bar, the evidence showed that the collision occurred when the car approaching from the left had reached the area beyond the middle of the intersection and the one approaching from the right had not then reached the middle of the intersection and where the car coming in from the left was struck in the rear by the front part of the car coming in from the right."

In *Roth v. Lundin*, 237 Ill. App. 457, the court said:

"Defendants were in their car, purchased with their joint funds, and traveling northward in Winchester Avenue at an excessive rate of speed approaching Wilson Avenue, with Mrs. Lundin at the wheel. Plaintiff's car was traveling westward on Wilson Avenue and just as it reached Winchester had slowed down to a speed of less than twelve miles per hour. It reached the intersection first and had the right of way."

And in *Darling & Company v. Yellow Cab Company*, 238 Ill. App. 326, it was held:



"We are therefore of the opinion that the question in the instant case whether the defendant had the right of way was for the determination of the trial judge."

And in *Salmon v. Wilson*, *supra*, it was further held: "Under the claim of right of way defendant certainly had no right to keep up a speed that was **prima facie** a violation of the law and run down one who was observing the law."

We conclude that we should not hold as a matter of law that appellee was guilty of contributory negligence simply from the fact that appellant was approaching the intersection from the right.

Appellant complains of the giving by the court of appellee's eighth instruction, that if the jury believed from a preponderance of the evidence that appellee on the 15th day of June, A. D. 1927, was traveling in her motor vehicle northward on the east side of Union Street "towards Sixth Street," in the City of Lincoln, etc. The instruction, as given, was correct instruction as to the duty of drivers at intersections. It is objected that the inclusion of "towards Sixth Street," would tend to confuse the jury inasmuch as some of the jurymen may have lived in the City of Lincoln and may have known of an invalid ordinance then in existence in that city. No such ordinance is shown in the record, and it is not shown where any of the jurymen resided and we regard the objection as based upon too many inferences. The instruction stated the fact and the law and is not subject to objection.

Finding no error in the record that warrants a reversal of the judgment of the Circuit Court of Logan County, it is affirmed.

Affirmed.

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253 I.A. 633⁵

General No. 8281

Agenda No. 33

OCTOBER TERM, A. D. 1928

Nancy E. Gobin, Appellee,

vs.

Chicago & Illinois Midland Railway Co., Appellant.

Appeal from the Circuit Court of Mason County, Ill.

SHURTLEFF, J.

Appellee brought suit to recover damages for injuries received while alighting from appellant's train at Kilbourne on June 8, 1926. The declaration consisted of four counts. The first three counts charged the duty of appellant to furnish passengers and appellee a reasonably safe place to alight from said train; failing to perform that duty; negligence in directing appellee to alight from said train at an unsafe place; negligently stopping the train at a place which was not reasonably safe for appellee to alight and in negligently directing appellee to alight at a place where the train stopped; knowledge of the appellant of the dangerous and unsafe condition of the place where appellee was directed to alight from said train; and due care on the part of appellee for her own safety. The fourth count in substance alleged that appellant failed to have its premises at Kilbourne in a reasonably safe condition; negligently and carelessly stopped its train at an unsafe and dangerous place, which dangerous and unsafe condition and the danger of the appellee in alighting from said train, at said place, were known to appellant or by exercise of reasonable care and diligence could have been known; that after said train had stopped at said station

appellee, at the direction of the conductor, went upon the steps of the car used by passengers in going into and from the said car, and informed the conductor that the distance between the lower step of the car and the ground was too great for her to alight with safety; that the conductor directed her to alight and promised her he would assist and help her to alight from said car, and assured her it was safe for her to alight from said car with his help; that appellee relied upon the promise of the conductor and his agreement to assist her; that she attempted to alight from said car to the ground and in attempting to alight, the conductor, after he had taken hold of appellee's arm to assist her, without warning, negligently, carelessly and recklessly let loose of appellee's arm and failed to assist her as he had promised, and that as a result of this negligence appellee fell from the step to the ground; that appellee was in the exercise of due care and diligence for her own safety and was injured. Appellant filed a plea of the general issue. The cause was tried by a jury and appellee presented proofs tending to show that appellee left Kilbourne, Mason County, the morning of June 8, 1926, with her daughter to go to Peoria to visit her husband, Richard M. Goben, who was confined in the Methodist Hospital in that city. They left Peoria on the train in question at three o'clock p. m., and arrived at Kilbourne about five o'clock. When she boarded the train at Peoria, there was a stool or step furnished appellee and the other passengers, to aid in getting aboard the train. When the train stopped at Kilbourne, a new conductor was in charge of the train, the one starting with the train at Peoria changing with the conductor Woods at Havana. Appellee was the last person out of the car. The car had four steps, the platform which leads into the door of the car and three steps below the platform step. The lower step of the car, according to the testimony of appellee's witnesses, was from two to two and one-half feet above the cinder platform, upon which the passengers alighted from the train. No step or stool was

furnished to the passengers. There was none on the train. When appellee reached the lower step the conductor was standing on the platform. Appellee said to him, "This looks like a high step for me," and he said, "I know it is, but I will help you." The conductor took hold of her arm and as she started to step from the lower step to the platform he let loose of her arm and she fell to the ground right after she stepped off. She fell upon her right knee on the platform. The shock occasioned by the fall made her temporarily blind and sick. She lay on the ground for some time until some person secured a chair. She was placed on the chair and fanned for a time, and then taken to the depot. From there she was taken in an automobile to her home, four miles from Kilbourne. She was bedfast, unable to move for eight days. She immediately felt pains in her abdomen, and her right knee became badly swollen. She was examined in the station by Dr. J. W. Root. This examination was made for the sole purpose of determining whether any bones had been fractured. Dr. Root found no fractured bones, but suggested she get a physician to care for her. Dr. Root was eighty-three years of age and was unable to travel to appellee's home to care for her. Dr. Root had been appellee's family physician for forty years and attended her at the time each of her seven children were born.

In addition to Dr. Root's testimony with reference to his examination at the depot he testified appellee had received no injuries during childbirth that would cause a hernia.

Upon arriving at her home plaintiff was put in bed by the family and the next morning, when it was found her injuries were severe, Dr. J. F. Russell of Oakford, Illinois, (the station south of Kilbourne) was called to care for appellee. Dr. Russell was the local physician for appellant. Dr. Russell bandaged the right knee; left directions that if the swelling continued to

remove the bandage. The knee continued to swell to such an extent that one of the members of appellee's family was obliged to remove the bandage that evening. The next morning the doctor returned and rebanded the knee and continued this treatment for some time. The pain in the knee was severe; the pains in the lower abdomen were also severe and very keen. Dr. Russell instructed appellee that if she should have a strangulated hernia to call him or some other physician without delay. Appellee was confined to her home for some time after she was able to get out of bed. Since the injury, however, she has been unable, because of severe pain in her knee and abdomen, to stand up or to get about without the use of a cane. Many witnesses testified as to the ability of appellee before this injury, not only to perform all of her usual duties in taking care of her home, garden and raising chickens, as any farmer's wife would do, but in addition cooking for twenty-five threshers and serving their meals. It was also shown by the same witnesses that since the injury appellee has been unable to do any work around the house except what she is able to do sitting down, such as peeling potatoes and washing dishes, when a cabinet is drawn up to her, or by putting the dishes on a chair in front of her; that she has been unable to do any work whatsoever outside of the house.

Some time after appellee was able to get about she consulted (at the suggestion of Dr. Russell) Dr. C. H. Steubenrauch of Havana, Illinois, a general practitioner, who, in turn, suggested she be examined by a surgeon, Dr. Frank G. Morrill of Peoria one of the leading surgeons of that city. Dr. Steubenrauch and Dr. Morrill both testified that at the time of their respective examinations they found an impulse in each inguinal ring more than normal, and a bulging of each inguinal ring region which was more marked on the left; also that the rings were more relaxed than

normal. Dr. Steubenrauch testified appellee had an enlarged opening of the inguinal canal or ring that might result in an inguinal hernia; that this is the type of hernia which results when the inguinal canal is enlarged enough to permit the peritoneum, the internal covering of the abdominal cavity, to get down into the opening and form a sac. This causes a rupture or hernia. When the blood supply of the parts which get down into the sac is cut off this produces a strangulated hernia.

Dr. Morrill testified that in his opinion the condition found could not be remedied by an operation. Dr. Steubenrauch testified he would deem the condition found and described as a "potential hernia." Both physicians testified that an examination was made on the day of the trial and the conditions found by them in the first examination were still present. Dr. Steubenrauch also testified that on the day of the trial he made an examination of the right knee by looking at it, feeling of it and measuring and by comparison with the other knee, and found that immediately below the kneecap the right knee was about one-half inch larger than the left. It was also shown by both physicians that the conditions described by them were permanent. It was shown by the testimony of appellee and other witnesses that she had never suffered from hernia, and that she had never had an injury of any kind. It was also shown by appellee and other witnesses that from the time of the injury to and including the date of trial her right limb was crippled. The members of the family noticed a change in the condition of her knee when she attempted to use it. In the morning it is swelled a great deal more than when she retires. She has suffered pain at all times since the injury.

There was a conflict in the testimony, appellant offering proofs tending to show that the lower step on the passenger coach was not over twelve or twelve and one-half inches above

the platform; that appellee was a woman fifty-eight years of age, five feet six inches in height, and at the time of the accident weighed slightly over two hundred pounds; that prior to the accident she had suffered for several years with excess weight, heart and kidney trouble, myocarditis, endocarditis and Bright's disease. Although denied by appellee, some testimony was offered tending to show that appellee had for several years suffered from rheumatism and an acute arthritis in her right knee, and that she had been under the care of two physician's by each of whom she was treated for arthritis in her right knee. There was a verdict in behalf of appellee in the sum of five thousand dollars, motion for a new trial by appellant, which was overruled, and judgment on the verdict. The record is brought to this court by appeal for review.

It is first assigned as error that the cause was tried upon the theory that appellant was an insurer of the safety of appellee while she was its passenger and while she was alighting from its train; and that the evidence fails to show any negligent act or omission on the part of appellant company which even remotely contributed to the accident. Appellant did not demur to the declaration and presented no motion in arrest of judgment.

In **C. & A. R. R. Co. v. Murphy**, 198 Ill. 469, the court held: "A railroad company, in the protection of its passengers against injury or danger, is bound to exercise the highest degree of care and skill reasonably consistent with the due operation of its road. It is not an insurer against danger or injury but is held to the extraordinary care and vigilance." It has been further held:

"The duty of a carrier to its passengers in carrying them into their destinations is not only to exercise the highest degree of care and prudence consistent with the practical operation of its road, but also to exercise the same care to afford them reasonable

opportunities to leave its train." (*John M. Harvey v. C. & A. Ry. Co.*, 116 Ill. App. 507.)

("A railroad company owes a passenger the duty of furnishing a suitable and safe platform and steps upon which to leave the car, and is responsible for any defect therein causing injury to the passenger which human care, vigilance and foresight, reasonably exercised, could have discovered and guarded against, consistent with the operation of the road," (*I. C. R. R. Co. v. O'Connell*, 160 Ill. 636; *C. & A. R. R. Co. v. Arnol*, 144 Ill. 261; *Pa. Co. v. McCaffrey*, 173 Ill. 173; *Chicago Terminal R. R. Co. v. Schmelling*, 197 Ill. 629; *C. & A. R. R. Co. v. Murphy*, *supra*.) Whether appellee was in the exercise of due care for her own safety was a question of fact for the jury. *Penn. Co. v. McCaffrey*, 173 Ill. 173. Whether under all the circumstances a person fails to exercise ordinary care is a question of fact for a jury and under the evidence if the finding of the jury is justified, it is beyond the power of the appellate court to disturb it. *C. & A. A. R. R. Co. v. Rayburn*, 52 Ill. App. 277. What constitutes ordinary care depends upon the circumstances of each particular case for its exercise. (*C. & A. R. R. Co. v. Byrum*, 153 Ill. 136; *West Chicago Street R. R. Co. v. Buckley*, 102 Ill. App. 314.) Appellee in this case had a right to rely upon the invitation of the conductor and his assurance of assistance. (*C. & A. R. R. Co. v. Gore*, 202 Ill. 193; *C. & A. R. R. Co. v. Rayburn*, *supra*.) We can not agree with appellant's first contention.

Appellant assigns error on the ground that testimony was introduced by appellee tending to show that appellant had raised the rails of its track at the Kilbourne station several inches in height, at or just before the time of the injury, which had the effect of making the car step that much higher than the

einders platform; when in fact appellant, on the motion for a new trial, presented affidavits of its workmen showing that said rails were not raised until a considerable time after the injury. On the trial appellee presented a witness who testified that the rails of the track had been raised, "but I don't know whether it was that day or not." Another witness testified: "I saw the train stop that evening and I think they raised the track about eight or ten inches. They took out the old rails and put in new ones on top and took out the old ties. They put the new ties in on top of the ground and there was a change in the height of the rails, I should judge six or eight inches." Neither witness testified when this was done and was not cross-examined upon that subject. It is contended that this testimony prejudiced appellant's case and a new trial should have been granted on the affidavits presented. Appellant had full notice that one of the main issues in the case centered around the matter of distance from the passenger step to the cinders platform and the question as to when the track was raised was a collateral question of which appellant had full knowledge. The real question on this issue was the distance from the passenger step to the platform. The affidavits presented do not show a ground for a new trial, inasmuch as the affidavits do not show diligence and do not show that appellant can furnish any testimony of a conclusive character, but merely matters of a cumulative and impeaching character. It is not shown that appellant could not as well have furnished the testimony on the trial as now. (**Graham v. Hagmann**, 270 Ill. 252; **Springer v. Schultz**, 205 id. 144.)

It is assigned as error that the court admitted the evidence of physicians tending to show that appellee was troubled with or had an enlarged inguinal ring, from which appellee's witnesses were permitted to testify that a hernia might result, before



there was any testimony as to an accident and upon appellee's promise to later connect the testimony with the case. It is contended that no connection was shown at any time, and that the admission of the testimony was very prejudicial. It is also contended that neither physician who testified attributed the condition to the accident. Following this testimony, appellee did offer proofs tending to establish the accident. Appellee furnished also the testimony of appellee's husband and two daughters, all of whom testify as to the condition of appellee both before and after the injury. Appellee testified that she had at no time prior to the injury suffered pains in the region of her body where a hernia would occur. Appellee testified that shortly after the accident she suffered pains in her lower abdomen—"it just seemed to hurt me all over," and she states she has had "a keen bad pain—terrible bad pain and pain in my lower abdomen which has continued until now." Appellee also testified she had never had an injury until this one.

Dr. Root, eighty-three years of age, testified that he had been appellee's family physician and attended her when each of her seven children was born and during her married life. He testified that to his knowledge appellee was never injured in childbirth in any manner that might cause hernia.

Appellee was examined after the injury by Dr. Stubenrauch of Havana. He testified: "I found an enlarged external ring and an impulse on coughing. The ring is located in the lower part of the body and is formed by the abdominal muscle. The inguinal canal is formed by various muscles and ligaments of the abdomen. The internal opening is the internal ring, and the external opening is the external ring. It was injured to the extent that I was able to feel a slight impulse. By impulse I mean that on coughing the intra-abdominal pressure is increased



and is transmitted downward to any place that would be weak enough for it to be felt. From the facts I concluded that she had an enlarged opening there which might result in an inguinal hernia. By the term inguinal hernia we mean the type of hernia that results when the inguinal canal is enlarged enough to permit the peritoneum, which is the internal covering of the abdominal cavity, to get down into the opening and form a sac, and then some of the abdominal viscera gets down into the sac, and that forms a rupture or hernia.

"When the blood supply of the parts which get down into the sac is shut off, that is called strangulated hernia. The enlargement of the ring may come from several different sources; it usually enlarges gradually and the sac comes down gradually. It may be due to direct or indirect force. We mean anything that is not direct force. For instance, it may be due to a weakening of the abdominal muscles for some reason or other,—anything that would cause the abdominal muscles to weaken. I would class a strain or a fall as a direct injury."

He further testified: "In my opinion the ring is permanently enlarged. The canal would be abnormally enlarged, I should say permanently, and the impulse on coughing would remain and would be constantly there."

Dr. Steubenrauch advised appellee to have an examination made by Dr. Frank G. Morel, a skilled surgeon of Peoria. This was done and Dr. Morel testified that he made an abdominal examination of the abdominal wall and states: "I found an impulse in each inguinal ring, more than normal, and a bulging of each inguinal region, more marked on the left side. By bulging I mean a bulging out of the muscle tissue, and abdominal tissue in the region of the inguinal canal, a bulging forward. I could not determine from the examination the cause of the condition which I

found. It could have been caused in a number of ways; sometimes it occurs without any definite cause to which it could be attributed. At other times it is by an injury, either by direct or indirect. I found the rings relaxed more than normal and the most definite finding was the bulging of the tissues about the rings."

Dr. Morel further testified that he had examined appellee on the day of the trial and found the same condition. He testified that the condition was permanent.

Appellant presented counter-testimony and there was a sharp conflict in the testimony as to appellee's injuries. However, all of the physicians who testified stated that hernia or enlargement of the inguinal rings or as it was described "potential hernia" was caused by direct or indirect violence. Under the testimony as stated, the condition as described, the pain and suffering from it, as claimed by appellee, and that the conditions did not exist prior to the injury, as shown by the proofs, we can not hold, as a matter of law, that the proofs offered were not sufficiently connected to be presented to the jury. Much proof was submitted both on the part of appellee and appellant as to injuries to the abdominal region and as to appellee's knee and it was entirely for the jury to determine the extent of the injuries, if any, and their cause. The assignment of error must be overruled.

Appellant assigns error upon the putting of certain questions on cross-examination to appellant's witness Dr. J. F. Russell in an attempt to bring the subject of settlement into the case. Appellant presented Dr. Russell as a witness and he had testified that he had treated appellee at two different times in the fall of 1925. The Doctor had found that appellee in the fall of 1925 had a heart involvement, myocardia; that it was not a good heart;

that she had excessive weight and an unusual amount of fat and chronic arthritis. He stated that arthritis manifested itself in the heart muscles and the ankle and knee joints, and that the knees caused her the most trouble, the condition not more noticeable in one knee than the other. The witness Russell was called to examine appellee the day after the injury in question and testified: "At that time her knee was swollen and she said it was painful. I took care of her something like two or three months. At the end of that time she was able to be up, and I would go over her. I would have her get up and see if she could put her weight on this knee and walk to the chair.

"When it appeared to me that the knee was about as it was when I treated her before the accident happened, I ceased to treat her. In 1925 I treated her for this chronic arthritis and this heart muscle. She had albumin in the urine, and chronic arthritis and nephritis, at least sub-acute. When she came to the office she was there for rheumatism; she said she had it and of course that is only a symptom of a chronic infection somewhere. I was not able to find out myself where the infection happened to be."

On cross-examination the witness had testified that he was employed as a physician by appellant company and was so employed when he was called to treat appellee for the injury in question; but that he did not know of his employment at that time. Counsel inquired of the witness:

Q. "You tried to make a settlement on behalf of the railroad company?"

A. "No, sir."

The witness was further questioned if it was not a fact that he went to the home of appellee with Frank O'Donnell, who stayed out in the car, and if he did not go into the house and

state to appellee that the railroad company had sent him to make a settlement of the case. This the witness denied. The witness was asked if he did not state to appellee that he would recommend a settlement for the knee but would not recommend a settlement for the hernia. To the last question the court sustained an objection and the former questions were answered over the objections of appellant. When appellee offered her rebuttal proof, attempting to impeach the witness Russell, some questions were answered over objections and then the court struck out the testimony of the subject matter of settlement. It is contended by appellant that the injection of this subject into the case and before the jury constituted error. It is not competent in a suit at law to undertake to show that either party has offered to buy his peace or settle the lawsuit, but it is competent in all cases to show the interest of a volunteer witness and impeach his testimony. In **Butler Ballast Co. v. Hohshaw**, 94 Ill. App. 71, the court said:

"It is objected the court permitted two of appellant's witnesses to be asked, on cross-examination, if they had not tried to procure from appellee releases to appellant for his injuries, and, it is argued, such evidence tended to prove appellant admitted its liability. The evidence was not competent for such purpose, but it was proper for the purpose of tending to prove the interest the witnesses had assumed, and might be considered in connection with their credibility, and was therefore proper cross-examination. It frequently occurs that evidence is admissible for a specific purpose, and for none other. In such cases, it must be admitted, and its use or effect controlled by the request for proper instructions for such purpose."

And in **Elam v. Majestic Coal & Coke Co.**, 155 Ill. App. 380, Mr. Justice Duncan, speaking for the court, held:

"Dr. Gillis' evidence discloses the fact that the coal company sent him to treat appellee when he was injured; that he did a great deal of work for the appellant, and he admitted that he advised the appellee to settle his claim with appellant. He also testified as witness for appellant that he had no interest in this law suit. For the purpose then of simply testing the question of whether or not he was an interested witness, or rather as tending to show that he was somewhat interested in the suit, it was proper for appellee's counsel on cross-examination to ask him if it was a fact that appellant requested him to see if he couldn't get him to compromise or settle this suit." We find there was no error in the examination.

No complaint is made by appellant as to the giving or refusing of instructions, and no other errors are pointed out as to rulings upon evidence. It is finally contended that the verdict is against the manifest weight of the evidence and was brought about by the prejudice and passion of the jury. Counsel for appellant cite **Texas Midland R. Co. v. Frey**, 25 Texas Civ. A. 386, holding:

"Where the distance from the step of a railroad passenger car to the platform provided for passengers to alight was not more than eighteen inches, the fact that the company did not provide a stool or box for the passengers to use as an additional step in alighting to such platform was not such negligence as would authorize a recovery for injuries sustained by a fall of a passenger while alighting." And **Young v. Mo. Pac. R. Co.**, 39 Mo. A. 267, holding:

"Where the height of the last step of a car above the platform is not greater than that between the ground and the last step of vehicles in general use, and thousands of persons have made their exit unassisted from such car without the happening of a single accident to them, the carrier is not negligent in not furnishing a portable step for the use of the passengers in leaving the car."

Our own state apparently has not passed upon the identical

question and in any event the contention made ignores the fourth count of the declaration.

It is further contended that much of the testimony as to appellee's condition comes from members of her own family and should be weighed by the court with a great deal of caution. These are matters to be weighed and considered by the jury. Upon reading the entire record, we are not able to say that the verdict is against the manifest weight of the evidence. The judgment, therefore, of the Circuit Court of Mason County is affirmed.

Affirmed.



STATE OF ILLINOIS.

APPELLATE COURT,

FOURTH DISTRICT.

OCTOBER TERM , A. D. 1928.

FILED

FE. 1 1928

Robert H. Noel
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILL.

TERM NO. 38.

AGENDA NO. 33.

THE PEOPLE, ex rel LEO
SAUGET,

Appellees.

VS.

JOHN N. WUEST, Town Collector
of Centerville Township, and
MARTIN SCHNIPPER, County Treasurer
and Ex-Officio County Collector of
St. Clair County,

Appellants.

253 I.A. 634¹

Mandamus.

Wolfe, J. Leo Sauget, as relator, filed his petition for a writ of mandamus, to the September Term, 1927, of the St. Clair County Circuit Court, against John N. Wuest, Town Collector of Centerville Township, in said County, and Martin Schnipper, County Treasurer and ex-officio County Collector of Taxes of said county, to compel them respectively to pay over to the Treasurer of the Village of Monsanto, a municipal corporation located in the Township of Centerville in said county, one-half of the road and bridge taxes for the year 1926 collected by said collectors upon property lying within said village.

The relator is a resident of the village and President of its Board of Trustees. His petition sets out that the Village of Monsanto, which lies entirely within and is a part of Centerville Township, was, on August 14, 1926, duly incorporated under the laws of the State of Illinois; that the equalized value of all taxable property within said village, as equalized for state and

county purposes for the year 1926, was \$4,175,741.00. That on September 7, 1926, the Highway Commissioners of the Town of Centerville, pursuant to law, detirmined and certified that the amount necessary to be raised by taxation for construction, maintenance and repiar of roads and bridges in said town was the sum of \$47,054.00. That said cerfificate was duly filed with the County Clerk and approved by the Board of Supervisors at its regular meeting on September 14, 1926.

That the County Clerk thereupon extended the said amount of \$47,054.00 as taxes against the taxable property of said town, including the taxable property lying within the confines of said village which was and is a part of said town. That the amount assessed upon taxable property lying within said village was the sum of \$27,279.70. That the respondent John N. Wuest, as Town Collector, then collected taxes on said account \$26,161.75 from owners of taxable property lying within said village and that after his proper commission and other proper deductions there was a balance \$25,636.68 of the road and bridge fund collected for property within said village. That one-half of this amount so collected, or \$12,818.34, was under the law payable to the Treasurer of said village to be appropriated by said village to the improvement of roads, streets and bridges, either within or without said village and within said town under the direction of the corporate authorities of sqid village, and that it was the duty of Wuest to pay same over to said Treasurer as it was collected.

That about March 10, 1927, said Wuest returned his tax books of said town to the respondent Martin Schnipper, County Treasurer and ex-officio County Collector, and delivered the statement required of him of the amount he had

been unable to collect, and said Schnipper thereupon proceeded with the collection and collected an amount of \$1,098.30 for road and bridge taxes against property lying within the limits of said village. That after the deduction of the County Collector's commission there was a balance of \$1,076.33 of road and bridge taxes on taxable property within said village and that it became the duty of said Schnipper to pay one-half of said sum, or \$538.17 to the Treasurer of said village for the same use as above stated in the case of Wuest. That said Wuest refused and still refuses to pay over to said Treasurer the sum of \$538.17, to which the village is lawfully entitled.

The prayer of the petition is for a writ of mandamus against Wuest as Town Collector, commanding him forthwith to pay the above stated sum collected by him to the Treasurer of said village, and a like writ against said Schnipper, County Treasurer and ex officio County Collector, to pay to the Treasurer the said sum of \$538.17.

By leave of Court, the petition was amended by interlineation to aver that on September 7, 1926, the date of the tax levy, "there was laid out and existing streets and alleys within the corporate limits of said village."

An answer was filed for the respondent Wuest and a plea for the respondent Schnipper. Edward Sparn as Supervisor and ex officio Treasurer of the road and bridge fund of the Town of Centerville was given leave to become a defendant and filed his answer. Demurrers were filed to these answers and plea and were sustained by the Court. Additional pleas were filed by the various respondents.

The first additional plea of respondent Wuest avers that the village of Monsanto was not incorporated on August 14, 1926, as averred in the petition, and that said

village did not become an incorporated village until October 5, 1926, which was a date subsequent to the date of September 7, 1926, upon which the Highway Commissioner determined and certified the amount of taxes necessary for road and bridge purposes in said town and that therefore the village and said Treasurer are not entitled to receive any part of said taxes. Issue was joined upon this plea by the replication of relation.

The fourth additional plea averred that the tax book for the year 1926 delivered to the Town Collector by the County Clerk, together with the warrant for the collection of taxes, did not contain any separate list or valuation of property within the corporate limits of said village and no public record exists in either of said books showing the property within said corporate limits and it is not possible, from any record of assessment or of taxes nor from any public record to ascertain for the year 1926 what amount was collected for road and bridge purposes on property within said village. Demurrer was also sustained to this plea and this ruling is questioned here.

The fifth additional plea denies that the equalized value of taxable property was the amount stated in the petition, denies that the amount assessed for road and bridge purposes and the amount of taxes collected by Wuest and the net amount of taxes for road and bridge purposes from property within the village are the amounts as stated in said petition. Issue was joined by replication to this plea.

The sixth additional plea denies the amounts of such assessed values, taxes and balance and avers that said amounts are much less than as stated in the petition. Issue was also joined upon this plea.



Later an additional plea was filed by respondent Wuest stating that before any demand was made upon him by or on behalf of the village and prior to any notice or knowledge on his part that the village claimed one-half of the road and bridge taxes he paid over to Edward Sparr, the Supervisor and ex officio Treasurer of said road and bridge fund, the amount of \$15,636.68 of road and bridge taxes collected by him on property which petition now claims was within the corporate limits of said village, being \$2,818.34 in excess of the one-half of said road and bridge taxes upon property which petitioner now claims was within said corporate limits. He therefore states that no writ can issue against him to compel payment of the above fund of \$2, 818.34 which he so paid to said Supervisor. The replication to this plea alleges that such payment, if any, was wrongful and illegal and that no demand on the part of the village was necessary. An issue of fact was raised upon this pleading.

Similar pleas was filed by the respondent Schnipper and by the respondent Sparr, who questioned the amounts of values, taxes and net amounts as stated in the petition.

By agreement of the parties a jury was waived and the cause was tried by the Court. The Court found that Wuest had collected road and bridge taxes upon real and personal property wholly within the corporate limits of the village; that the village of Monsanto was entitled to one-half of the amount, or \$12,800.65; that the respondent Schnipper collected road and bridge taxes on property wholly within the corporate limits of said village, and that the village was entitled to receive one-half of the amount, or \$534.65.

A writ of mandamus was ordered against these respondents, respectively, to pay over said amounts within eleven days and ten days was given within which to file appeal bonds.

The evidence shows that a petition was filed by residents of certain territory in the County Court on April 5, 1926, to have an election to decide whether said territory can be organized as the incorporated village of Monsanto. An election was held on August 7, 1926. An order was entered by the County Judge of St. Clair County, August 14, 1926, finding that the result of the election was for organization, and this order concludes with the finding that said proposed village, with the boundaries and the name of the "Village of Monsanto," shall henceforth be deemed an organized village under the general laws of the State of Illinois." This the relators insist was a full compliance with the statute and from that date the village of Monsanto became an organized village.

On September 10, 1926, the Judge of the County Court entered an order fixing October 4, 1926, as the date for the first election of officers of said village and a subsequent order recites the holding of said election and the election of certain persons for president, trustees and clerk and adjudged that they were duly elected and authorized and empowered to act, etc. This order was entered October 6, 1926.

The main question in the case is whether the village became a complete corporate entity on August 14, 1926, the date the order was signed by the County Judge, or whether the date of its completion as a corporation was October 4, 1926, when the first election for officers was held. The tax levy in question was made by the Highway Commissioner on September 7, 1926.

The question then arises whether Section 145

or 146 is applicable in this case in the organization of the village of Monsanto.

Section 145 of Smith-Hurd Revised Statutes of Illinois, Chapter 24 provides as follows: -

"If a majority of the votes cast at such an election is for village organization under the general law, with the boundaries and name mentioned in the petition, shall, from henceforth, be deemed an organized village under this act, and the county judge shall, thereupon call, and fix the time and place of an election to elect village officers, and cause notice thereof to be posted or published, and perform all other acts in reference to such election, in like manner, as nearly as may be, as he is required to perform in reference to the election of officers in newly organized cities. But the term of office of trustees elected at such election shall terminate as soon as their successors are elected and qualified, at the regular annual election."

It is the contention of the appellants that the first election was a preliminary step to the organization of the village, and as such had no legal existence until after the election that was later called for the election of officers as provided in section 146, chapter 24 of our statutes, it being their contention that the language of sections 146 and 145 are in conflict and the two must be construed together before a municipal organization would have any legal existence.

The date of the organization of the village of Monsanto, or when the same came into legal existence as a municipal corporation become important, and if the relators are correct in their contention that the same came into existence on the 14th day of August 1926, prior to the time the Highway Commissioners made their levy for roads and bridge purposes for the township in which the village of Monsanto is situated, then there seems to be no controversy, or question, but that the village of Monsanto would be entitled to their share of the road and bridge tax so levied and collected. In the case of *Dowie v. The C. W. & N. S. Ry Co.*, 214 Ill. 49, the Supreme Court

of our State in passing upon the question of when territory becomes organized into a municipal corporation, said, "The statute expressly fixes the time when the incorporation is effected, and that is the time when the votes is canvassed and determined to be for the incorporation or organization under the general law, and that occurred on the 31st day of March. But at that time, however, there were no officers, and could be none until after an election was called, which took place on the 23rd of April, when the mayor and alderman were elected, as well as other municipal officers. But the plat was not part of the organization of the city. The plat is not required by the statute in order that a territory may become incorporated as a city, and in this case much of the territory that was incorporated was not platted, ----- in fact but a small portion of it was platted." (Croosk v. People ex rel. 106 Ill. 237.)

We are of the opinion that at the time the vote was canvassed and the County Judge entered the order publishing the result of the vote and declaring that the village of Monsanto was an organized incorporated village, that from that date, August 14, 1926, the village of Monsanto came into legal existence and was a legally organized incorporated village.

We are of the opinion that there is no conflict between the two sections of the statute herein referred to. The first section announces that when a village becomes organized,---in other words, when it become a municipal organization, the language is plain, and is free from ambiguity, and we think it must be taken according to its literal construction. This is the construction which it received in the Dowie case. (Supra). The second section referred to herein in this statute is a mere amplification which enumerates in specific manner the officers, the number, and declares that it shall be considered a body politic, etc.

There was no separation of property in the Town of Centerville within and without the Village of Monsanto in the assessment books and the tax books for the year 1926. The two collectors collected their raxes under the warrant made by the County Clerk.

In presenting the case before the trial Court counsel for relator had the Deputy County Clerk testify as to the amount of taxes for road and bridge purposes upon property claimed to be within the Village of Monsanto. Objection to this testimony was made by respondents but was overruled. The Deputy County Clerk made the separation of property within and without the village of the real estate by using a plat of the village furnished to him by the relator, who is president of the Board. As to personal property, the Deputy County Clerk ascertained the amount by using a list of persons and corporations claimed to be within the territory of the village on April 1, 1926(the assessment date). The relator testified that those persons and corporations were residents of that territory on that date. As to railroad and telegraph property the Deputy County Clerk used for his basis for separation of property within and without the village, information given him in writing by the railroad companies and telegraph companies showing what property they had in the village.

It is contended by appellants that the relators did not properly prove their case before the court, and therefore, the writ of mandamus should not have been awarded as there is no proper proof on which to base the writ, especially do they contend that the plat that was used by the witness Kaufman was improper and had no basis upon which his testimony could be given. The plat was not made by an engineer, but there was proof

that this plat was a true and correct plat and correctly represented the land as organized into the village of Monsanto.

We are of the opinion that it was not necessary that a civil engineer should make this plat; that anyone that had knowledge of the boundary lines of the different pieces of property would be competent to make such plat. It was from this plat that the Deputy County Clerk identified the lots and tracts of land as shown as being within the boundaries of the Village of Monsanto, and the values that were placed thereon by the assessor and the amount of the road and bridge taxes collected against the separate lots and tracts of land as shown on the plat.

Further objection is made to the proof showing the value of the personal property as being assessed within the village of Monsanto, and also the tax against the railroad and telegraph lines, being in the same village.

The witness Kaufman, who was Deputy County Clerk, testified that he brought into Court the book from the County Collector's office from which he had obtained his information relative to the amount of tax that had been collected within the corporate limits of Monsanto, and gave in detail the different items, and that the items as shown and given were true and correct. And we have been unable to find any evidence that controverts this.

The rule is that the law is satisfied where facts sought to be established have been proven by the best evidence of which its nature is susceptible. (P. C. C. & St. L. R. R. Co. v. Chicago, 242 Ill. 193). The evidence clearly shows that there was no separation of these taxes on the tax books of the township, but that they were all in one book. No way has been pointed out that would have been better than the one which was followed by the relators in their separation of these items to show the amount

actually due the Village of Monsanto. Under such circumstances we are of the opinion that the method adopted in this case was proper.

The appellants contend that the Court erred in sustaining demurrers No's.2, 3, and 4 to the pleas of each of the appellants. The 2nd and 4th pleas aver that there was no separation of the real and personal property within and without the limits of the village on the tax books of the township for 1926. This we think is immaterial whether there was or was not; but, this was thoroughly gone into by the witness, as this Court held to be proper evidence under the circumstances. Therefore, we are of the opinion that demurrers to pleas No's.2 and 4 were properly sustained.

The 3rd additional plea avers that there were no streets nor alleys within the said village that were under its care during the period the taxes were collected.

Nowhere in this record does it appear that appellants were denied the right to prove any fact that was competent or relevant through the ruling of the Court in sustaining a demurrer to this plea. It is an established rule in the State of Illinois that if a Court commits error in sustaining a demurrer to a plea, such error is not sufficient to reverse a judgment where the case was tried upon other pleas, unless it appears that such error worked injury to the party complainant.(Bartee Tie Co. v. Jackson, 281 Ill. 461.)

It is said in Kimball v. Miller, et al,
546 App. 665::

"It is immaterial whether a special plea to which a demurrer was sustained is good or bad, when the defendant in the evidence and by instructions has had "

the full benefit of the matter contained in the plea."

Also, in *Robards v. Wabash Railway Co.*, 84 App. 477:-

"Where a demurrer is erroneously sustained, but the party is permitted to introduce, and has the benefit of all the evidence that could have been admitted under any of the counts to which the demurrer was sustained, the erroneous ruling upon the demurrer is cured and becomes a harmless error."

We are of the opinion that the appellants had the opportunity to prove everything their counsel offered to prove, relative to this plea, and while it may have been technically an error to overrule the demurrer, we think that they have not been prejudiced by the sustaining of this demurrer.

It is finally contended by the appellants that the writ of mandamus is a remedy which is applicable only where the duty to give it is clear and imperative and imposed by law. This we think is a correct statement of the law. It may be hard to establish the right to a writ of mandamus on account of the difficult nature in obtaining proof, nevertheless when the Court is of the opinion that from such proof the right to a writ has been clearly established then the law is satisfied and a writ should be awarded. In *People v. Czaszewicz*, 295 Ill. 17, the Court says:-

"It is also contended that the writ of mandamus will only be granted where there is a clear right to have the act performed by the respondent, when it is said that the writ of mandamus will only be granted where the right is clear, the expression does not refer to the evidence in the case but to the facts as they are actually found to exist. If upon the facts as the Court finds them, the plaintiff has a clear right to have the duties performed by the respondent, the writ will be awarded, regardless of the conflict in the testimony by which the facts are established."

The facts on which the Court based his opinion

that this writ should issue may have been complicated, but from a study of the case we think it is shown that the regulators have a clear right to have the duties performed by the respondents.

We are of the opinion that there is no reversible error in this case and the judgment of the Circuit Court of St. Clair County is hereby affirmed.

Affirmed.

Not to be reported in full.

FILED

STATE OF ILLINOIS.
APPELLATE COURT
FOURTH DISTRICT.

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

FEBRUARY TERM, A.D. 1929.

71

TERM NO. 6.

AG. NO. 16.

253 I.A. 634²

CATHERINE WOLZ,
Appellee,

V.

EAST SIDE LEVEE AND
SANITARY DISTRICT,
Appella t.

:
: APPEAL FROM
:
: MADISON CIRCUIT
:
: COURT.
:
:

Barry, P. J. - Appellee is the owner of certain real estate in Granite City abutting on West 20th street. She sued to recover damages to her property occasioned by the building of an approach in the said street immediately in front of her premises. Appellant demurred to the declaration and the demurrer being overruled it filed the general issue. The trial resulted in a verdict and judgment for \$300.00.

One of the errors assigned is that the court erred in overruling appellant's demurrer to the declaration. By pleading the general issue appellant waived the right to assign error in that regard; *Roumbos v. City of Chicago*, 332 Ill. 70. The question as to whether the declaration is sufficient to support the judgment could have been raised by an assignment of error, but this was not done. An assignment of error to the effect that the declaration was insufficient to support the judgment would have presented that question, *Chicago, Rock Island & Pacific Ry. Co., v. People*, 217 Ill. 164;

9115

 $\frac{1}{2}H_2$

2081 E. 1st St.

Figure 1

SECRET

[illegible]

Tykalowicz v. Metropolitan Life Ins. Co., 249 App. 280. The legal sufficiency of the declaration is not raised by a motion for a directed verdict; Swift & Co., v. Rutkowski, 182 Ill. 18; Klofski v. Railroad Supply Co., 235 Ill. 146.

Appellant contends that the court erred in allowing appellee to prove, over its objections, the market value of her property before and after the building of the approach. The record shows that appellant made no objection to that testimony upon the trial of the case. Having permitted the testimony to go in without objection appellant is in no position to complain. For the same reason there is no basis for the contention that the court erred in the giving and refusing of instructions as to the proper measure of damages.

Appellant contends that the court erred in refusing to direct a verdict in its favor. The evidence shows that appellant employed the Hall Construction Company to build the approach, but there is no showing that would warrant this court in holding that the Hall Construction Company was an independent contractor or that appellant was not liable for damages occasioned by the construction of the approach.

It is next contended that the verdict is not supported by the evidence. From a careful consideration of the evidence we are of the opinion that this contention cannot be sustained. No reversible error having been pointed out the judgment is affirmed.

Not to be reported

AFFIRMED.

Tykalsky v. Metropolitan Life Ins. Co., 249 App. 280. The

legal sufficiency of the decision is not raised by a motion

for a directed verdict; Swift & Co. v. Rutkowski, 182 Ill. 18.

Kloster v. Railroad Supply Co., 235 Ill. 146.

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her property before and after the building of the approach. The

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appellant employed the Hall Construction Company to build the

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contractor or that appellant was not liable for damages occasion-

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It is next contended that the verdict is not

supported by the evidence. From a careful consideration of

the evidence we are of the opinion that this contention cannot

be sustained. No reversible error having been pointed out the

judgment is affirmed.

AFFIRMED.

Not to be reported

STATE OF ILLINOIS.
APPELLATE COURT
FOURTH DISTRICT.

FEBRUARY TERM, A.D. 1929.

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT

TERM NO 16.

AG. NO. 7.

253 I.A. 634³

MAUDE GRANT,
Appellant,
V.
Z. Z. LYERLA, et al,
Appellees.

:
:
:
:
:
:
:

APPEAL FROM
UNION CIRCUIT
COURT.

Barry, P. J. - Under date of February 10, 1926, appellees executed a judgment note for \$1700.00 payable to Roberts Insurance Agency falling due January 1, 1927. The payee was a partnership consisting of A.J.Roberts, R.A. Roberts and Ivan I. Roberts. On June 10, 1926, the payee sold and endorsed the said note to appellant for the sum of 1700.00. Judgment was taken on the note by confession on March 10, 1927. Appellees filed a motion to open the judgment and for leave to plead. The motion was allowed and appellees filed two special pleas, one to the effect that there was no consideration for the note, and the other averred that there was a total failure of consideration. Each plea averred that appellant was not a bona fide assignee and holder in due course and before maturity. The trial resulted in a verdict and judgment for appellees.

The undisputed evidence is that appellant bought and paid for the note on June 10, 1926, long before maturity. She testified that she paid \$1700.00 for the note and that it was then and there endorsed and delivered to her. She was

then and for several years had been employed as office manager of the Roberts Insurance Agency at a salary of \$175.00 per month. She says that at the time she purchased this note she had accumulated between \$12,000.00 and \$15,000.00; that she had bought other notes from time to time from her employers; she says that she knew nothing about the consideration for the note. We find no evidence in the record that would warrant the conclusion of the jury to the effect that she was not a bona fide holder of the note prior to its maturity. The most that can be said is that the evidence might raise a suspicion that the purchase of the note was not in good faith. That suspicion is due to the fact that she is the office manager of the payee in the note and that she says in purchasing the note she drew a check and went to the bank and procured the cash on the check and then paid the cash to her employer. There is no evidence fairly tending to show that her testimony is in any way untrue. The burden of proof was upon appellees and they failed to prove that appellant was not a bona fide holder before maturity of the note. Appellee Aldridge, desired to secure an extension of the time for payment and on December 18, 1926 executed a chattel mortgage to appellant on five thousand bushels of corn. He signed the chattel mortgage himself and also signed the name of appellee Lyerla. The corn described in the chattel mortgage was the property of Lyerla and he testified that he never authorized Mr. Aldridge or any one else to execute or deliver such a mortgage. He says he sold the corn described in the mortgage and received the proceeds thereof. At the time the said mortgage was executed and delivered to appellee a notation was made on the note in question that it was secured by chattel mortgage. Appellees contend that under Cahills Illinois Statutes, ch. 95, par. 27, the note, therefore, was subject to all defenses existing between the payee and appellees. We are of the opinion that statute has no application. At the time the note was endorsed to appellant it

was not secured by a chattel mortgage. Because of appellees' failure to prove that appellant was not a bona fide holder of the note it is unnecessary to consider or determine whether there was a want or failure of consideration. The judgment is reversed and the cause remanded with directions to enter an order that the judgment of March 10, 1927 heretofore rendered in this cause shall remain in full force and effect as of the date it was rendered.

REVERSED AND REMANDED
WITH DIRECTIONS.

The clerk will incorporate in the judgment the following:-
The Court finds that there is no evidence in the record legally tending to prove that appellant is not a bona fide holder of the note sued on.

Not to be reported

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
February Term, A. D. 1929.

FILED

JUN 5 1929

253 I.A. 634

MARY WALKER,

Appellee,

vs.

ROBERT COSSEY, Admr.,

Appellant.

Appeal from the Circuit Court
of Pope County.

Hon. A. E. Somers,

Judge Presiding.

Opinion by HENRIK, J.

This is an appeal from a judgment of the Circuit Court of Pope County allowing a claim of \$585.00 in favor of appellee and against appellant as Administrator of the Estate of W. M. Cossey, Deceased.

Appellee filed her claim in the County Court of Pope County against the Estate of W. M. Cossey, Deceased, for services rendered the deceased, and, from a judgment allowing the claim, an appeal was prosecuted by appellant to the Circuit Court where the case was heard before a jury, resulting in a verdict in favor of appellee.

Appellee made a motion to expunge from the record certain parts thereof, which appear in the common law part of the record, on the ground that such parts, viz., the instructions and motion for a new trial, should be shown by the bill of exceptions. This motion was taken with the case, and ^{will} ~~shall~~ be considered first.

In actions at law, all motions for new trial, ~~interest of~~ ~~judgment~~, and all instructions given and refused by the court must be preserved in a bill of exceptions in order to present for review questions arising thereon, and such matter cannot be copied into the record by the clerk for consideration on review of the judgment. (Greenwell v. Hess, 233 Ill. 459.) Accordingly, appellee's motion to expunge from the common law record the instructions and motion for new trial is allowed.

Appellant further contends that the trial court erred in refus-

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JUN 2 1935

CLERK OF THE DISTRICT COURT
NORTH DISTRICT OF MINN.

1935 JUN 2

ing to allow the administrator to testify, but the abstract of record does not show that the court ruled that the administrator was an incompetent witness, or that appellant was deprived by any ruling of the court of the right to testify as a witness. All that the abstract of record shows is that there was an objection interposed to any further evidence on the part of the administrator when he was being examined, and, so far as the record discloses, appellant's counsel abandoned any further interrogation of the witness without any adverse ruling thereon by the Court. Accordingly, we cannot consider this alleged error of the trial court in the absence of a ruling by the court. (Village of Bradley v. New York Central Ry. Co., 296, Ill. 383.)

Appellant contends that the evidence is insufficient to support the verdict, but we cannot review this assignment of error because appellant has not preserved in the bill of exceptions his motion for a new trial or the ruling of the court thereon. (Yarber v. Chicago & Alton Ry. Co., 235 Ill. 589.)

Appellant also contends that the trial court erred in entering judgment that appellee's claim should be paid in due course of administration, when, in view of the alleged time of presenting the claim to the County Court, there should have been entered a special judgment payable out of the assets thereafter inventoried.

The claim of appellee is not abstracted, and it does not appear from the bill of exceptions that this question was in any manner presented to the trial court for ruling thereon. The rules of this court provide that the abstract of record must present fully every error relied upon for reversal.

For the reasons aforesaid, the judgment of the Circuit Court is affirmed.

Affirmed.

Not to be reported

Was here reported

APPELLATE COURT OF ILLINOIS,
FOURTH DISTRICT.

FILED

JUN 5 1929

Robert B. Roe
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

February Term, A. D., 1929.

PAPPASPIE & BAKING COMPANY,

vs.

ALTON & EASTERN RAILROAD COMPANY,

Appellee,

Appellant.)

Appeal from the
City Court of
East St. Louis,
Illinois.

Opinion by Judge Fred G. Wolfe.

253 I.A. 635

This is an appeal from the City Court of East St. Louis, wherein the Pappas Pie & Baking Company recovered a judgment for \$1000.00 against the Alton & Eastern Railroad Company for damages alleged to have been caused by a collision of one of the defendant's trains with a delivery truck of the plaintiff's.

The original declaration consists of several counts, but at the conclusion of the hearing of the evidence all but the Fifth Count of the declaration was dismissed, leaving only the count which charged substantially as follows: "The defendants then and there, by their agents and servants, having knowledge of the fact that people and vehicles were likely to be near, or on said switching track, that persons and vehicles frequently and generally traveled said road across said tracks and were likely to be on said road and on said switching track that said servants and agents of the defendants failed to keep a look-out for persons and property on and near said switching track, failed to give any warning of its starting its train toward said crossing and over said switching track and started their train of cars after they knew, or would have known by the exercise of their duty to keep a look-out, that plaintiff's truck was in danger, and they then and

FILED

JUN 5 1938

CLERK OF THE APPELLATE COURT
NORTH DISTRICT OF ILLINOIS

APPELLATE COURT OF ILLINOIS
NORTH DISTRICT

RECORDS SECTION

Transferred from the
Circuit Court of
Cook County, Illinois.

APPEAL FROM THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

IN RE: THE ESTATE OF
JAMES H. HARRIS, DECEASED

25514.088

CHAS. H. HARRIS, JR., ET AL.,

This is an appeal from the Circuit Court of

Cook County, Illinois, wherein the Appellee, James H. Harris, Jr., et al.,

recovered a judgment for \$1000.00 against the Appellant, Chas. H. Harris, Jr., et al.,

James H. Harris, Jr., et al., for damages alleged to have been

caused by a collision of one of the Appellant's trains with

a delivery truck of the Appellee.

The original declaration alleges that several

persons, but all the caption of the complaint is the Appellee,

James H. Harris, Jr., et al., and the Appellant, Chas. H. Harris, Jr., et al.,

alleged, leaving only the count which charged with the Appellee,

as follows: The declaration alleges that the Appellee, Chas. H. Harris, Jr., et al.,

alleged that the Appellant, James H. Harris, Jr., et al.,

people and relations were likely to be hurt, or on said

travelling track, of the Appellant, James H. Harris, Jr., et al.,

and generally, alleged that the Appellant, James H. Harris, Jr., et al.,

were likely to be on said track and on said travelling track

that said Appellee, James H. Harris, Jr., et al.,

keep a look-out for persons and property on and near said

travelling track, failed to give any warning of the same

to the Appellant, James H. Harris, Jr., et al.,

and caused death to one of the Appellant's trains, to wit, a locomotive,

now known by the Appellant as the Appellant's locomotive,

and caused damage to the Appellant's locomotive.

there so operated their train and cars in utter disregard of the rights and safety of persons rightfully on and near said crossing and switching track and thereby wilfully, wantonly and maliciously drove and switched said freight cars with great force and violence upon, into and against said motor truck, etc."

There is very little dispute about the facts in this case. The evidence shows that there is a cinder road extending south and east from a public street in the City of Alton across the two tracks of the defendant company; that this cinder road runs part of the way between the two tracks; that both the cinder road and the switch track of the defendant lead to the Federal Lead Company's plant, and that, at the time of the accident, the plaintiff's truck was being driven to the Lead Company's plant to deliver a load of merchandise.

The cinder road does not cross the switch track but runs parallel with it for a short distance. The cinders are nearly level with the edge of the outside rail. The plaintiff while driving his truck along this cinder road met another automobile and was crowded off the cinder road onto the right-of-way of the switching track of the appellant. The driver of the truck was unable to drive the truck out of the track, but was traveling away from the approaching train of cars of the defendant at the time of the collision. The evidence clearly shows that this cinder road was used daily, not only by the plaintiff, but by numerous other people in delivering goods to the Lead Company's plant.

It is urged by the defendant that practically the only question involved in the case is that there is no evidence to sustain the findings of the jury; that the defendant, by its servants, wilfully and wantonly drove

said train of cars against the automobile of the plaintiff.

It is the contention of the defendant that the plaintiff's driver was a wilful trespasser at this place at the time of the accident and they owed him no duty except not to wilfully injure him.

Where a railroad company has permitted the public to travel over its track or property for a considerable period of time and a considerable number of people have availed themselves of such use, the company must keep a look-out for persons on their property or tracks.-- (Bernier vs. Ill. Cen. R. R. Co. 296 Ill, 465.)

The evidence shows that the conductor of defendant's train saw the truck was caught over the rail; that he was of the opinion they were about one-hundred feet from the truck; that he signaled the engineer to stop and shouted to the man in the truck to get out of the way; that at this time the train was traveling at the rate of between three and four miles per hour. This evidence is corroborated by the engineer of the train who testified that the brakes on the engine were in good order and that he could stop the train going at that rate of speed at a distance estimated at between sixty and seventy-five feet.

The Court in the case of Browning vs. Illinois Terminal Company, 319 Ill., page 431, in a case similar to this, laid down the rule stating what is a wanton and wilful injury, and used the following language:

"Courts have recognized the difficulty of accurately stating under what circumstances a defendant may be held guilty of wilful and wanton misconduct in causing an injury. Such conduct imports consciousness that an injury may probably result from the act done and a reckless disregard of the consequences. Ill-will is not a necessary element to establish the charge. Plaintiff and defendant had a legal right to pass over the highway crossing, and each was required, in doing so, to observe due regard for the legal rights of the other. A wilful or wanton injury must have been intentional, or the act might have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through recklessness

or carelessness when it could have been discovered by the exercise of ordinary care." -- Lakeshore and Michigan Southern Ry. Co. v. Bodemer, 139 Ill., 596; Heidenreich v. Bremner, 260 id. 439; Ill. Cen. R.R. Co. v. Leiner, 202 id. 624. The same rule in a little different language is used in Bernier vs. The Ill. Cen. R. R., 296 Ill. page 465.

We are of the opinion that if this train was traveling at the rate of speed indicated by the witnesses for the defendant, which is just about the rate a man would walk, and they saw that the plaintiff's truck was on their switching track evidently stuck, that is a question then for the jury, which was properly instructed in this case, to say whether under all of the circumstances the defendant was guilty of wantonly and wilfully injuring the truck of the plaintiff.

The ad damnum declared upon in the summons and declaration is \$982.04. The jury by their verdict allowed \$1000.00, or \$17.96 more than the plaintiff asked for in its declaration. The defendant alleges that this is error, and claims they raised this point before the trial court. The record disclosed that the only thing that was said by the defendant in its motion for a new trial is point No. 15, which is: "The verdict of the jury is erroneous and excessive and for a greater amount than is warranted by the law of the case." They contend that this properly raises the point that the verdict is for more than the ad damnum claimed in the declaration.

In the case of the Prairie State Loan Company vs. Gonie, 187 Ill. 414, the same question was involved. The assignment of error being, "The verdict is excessive." The Court held in this case that the objection that the verdict exceeds the ad damnum cannot be raised in this manner; if the verdict exceeded the ad damnum there is no doubt had that fact been clearly pointed out, the court would not have hesitated to correct it. It should have been specifically stated in the objection that the



amount of the verdict exceeded the ad damnum. --

Utter vs. Jaffrey, 114 Ill., 470; Metropolitan Accident Association vs. Froiland, 161 Ill, page 30.)

We think that the testimony in this case sustains the allegations in the declaration and that the testimony as to the damage was properly admitted and there is no reversible error in the case.

The judgment is hereby affirmed.

Not to be reported

amount of the verdict exceeds the amount of the
 \$100,000.00, the amount of the verdict is \$100,000.00.
 Association of the State of California, Inc. vs. The State of California, Inc.

We think that the testimony in this case
 sustains the allegations in the declaration and that the
 testimony as to the damage was properly admitted and there
 is no reversible error in the case.
 The judgment is hereby affirmed.

Not to be reported

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IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT.

February Term, A. D. 1929.

EDMUND F. WIES,

vs.

JOHN ALVIN O'HOROW, LENA
O'HOROW and ALEX S. VIEN,
Executor of the Last Will
and Testament of CLARA WIES,
Deceased,

Appellant,

Appellee.

2531A. 635

Appeal from the
Circuit Court of
St. Clair County,
Illinois.

Opinion by Judge Fred G. Wolfe.

Clara Wies died testate in St. Clair County about December 2, 1926, leaving her surviving husband Edmund F. Wies, appellant, and Lena O'Horow, a daughter by a former husband, one of the appellees herein; the appellee, John Alvin O'Horow, is a minor son of Lena O'Horow.

The Last Will and Testament of Clara Wies was admitted to probate in the probate court of St. Clair County on August 4, 1927, and Alex S. Vien was appointed executor of the Will. At the time of her death the testatrix had title of record to a parcel of land situated in the City of East St. Louis. By her Will Clara Wies devised the real estate mentioned to appellant in fee, subject to an express charge that the appellant pay the sum of \$2000.00, payable \$300.00 annually for six consecutive years, and \$200.00 at the end of the six years period to Lena O'Horow to be used for the education and care of John Alvin O'Horow. Said Will also bequeathed a piano and victrola to John Alvin O'Horow. The Will gave all of the testatrix's remaining personal

EXHIBIT TO REPORT OF THE COMMISSIONER

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property to appellant.

On October 22, 1928, appellant filed his bill in Chancery in the Circuit Court of St. Clair County for the purpose of establishing an implied trust and to have the title in the property, both real and personal, conveyed to him. The bill alleges that appellant imposed great confidence in the honesty of said Clara Wies and believed she had the greatest respect and love for him and would do ~~nothing~~ detrimental to his financial interest or contrary to his desires and wishes; that she would deal fairly and honestly with him and invest his money, as his agent, as desired by him, and would inform him of the disposition of his money; but that she "clandestinely, fraudulently and in violation of the trust imposed in her, procured the conveyance of said described premises unto herself, well knowing that the consideration of said conveyance was the property of the complainant, and that it was the understanding between complainant and said Clara Wies that the said conveyance was to be made to complainant." That "said Clara Wies completed said purchase and wrongfully, fraudulently, deceitfully and cunningly caused the scrivener to make said deed of said property to herself; and secretly and quietly kept from complainant the fact that said property had been conveyed to her and the deed therefor had been recorded." Also that complainant had no knowledge or notice of the condition of said title until he was informed of the provisions of said Will. The prayer of the bill is substantially as follows: It asks for a temporary injunction restraining Alex S. Vien from inventorying real estate, personal property and money as the property of Clara Wies, and from selling, encumbering or otherwise dealing with said real estate, personal property and money, and from obtaining any order of the Probate Court causing appellant to be cited to make discovery to such Court of the said property or any part thereof until further order of the Court; that upon a final

hearing it be ordered and decreed that the real estate, personal property and money was the property of appellant and not that of Clara Wies, deceased, and that the purported legacies or liens provided for by said last will and testament did not attach or become liens against said real estate; that said real estate was illegally, fraudulently and clandestinely taken over by Clara Wies without the knowledge or consent of appellant; that the proceeds for the purchase, repairing and upkeep of said real estate were the proceeds of appellant; that the said real estate was held in trust by Clara Wies for appellant; that the cloud created thereon by the provisions of said will be removed, and that conveyance of said premises be directed to be made to appellant free and clear of said liens; that the money in the bank and household effects be decreed to be the property of appellant, and that Alex S. Vien, as executor, has no right, title or interest therein, and that appellant be allowed to retain the personal household effects and that the money be paid over to him. General prayer for relief.

The Chancellor found in favor of the defendants and the complainant has brought his suit to this court upon an appeal and assigns numerous causes of error on the record. The prayer of the bill in this case is that the real estate and personal property be declared to be the property of the appellant and not of his wife Clara Wies, deceased, and that the legacy and liens provided for in the Will of the said Clara Wies be declared not to be liens against the said real estate, and that said real estate was held in trust by Clara Wies for appellant. Further that said liens were a cloud upon said real estate and that the same be removed, and a conveyance of the real estate be made to the appellant free and clear of such liens, etc., etc.

In *Hursen vs. Hursen*, 209 Ill. 466, it is held a bill to set aside and cancel a deed from complainant to the defendant upon the ground that of fraud

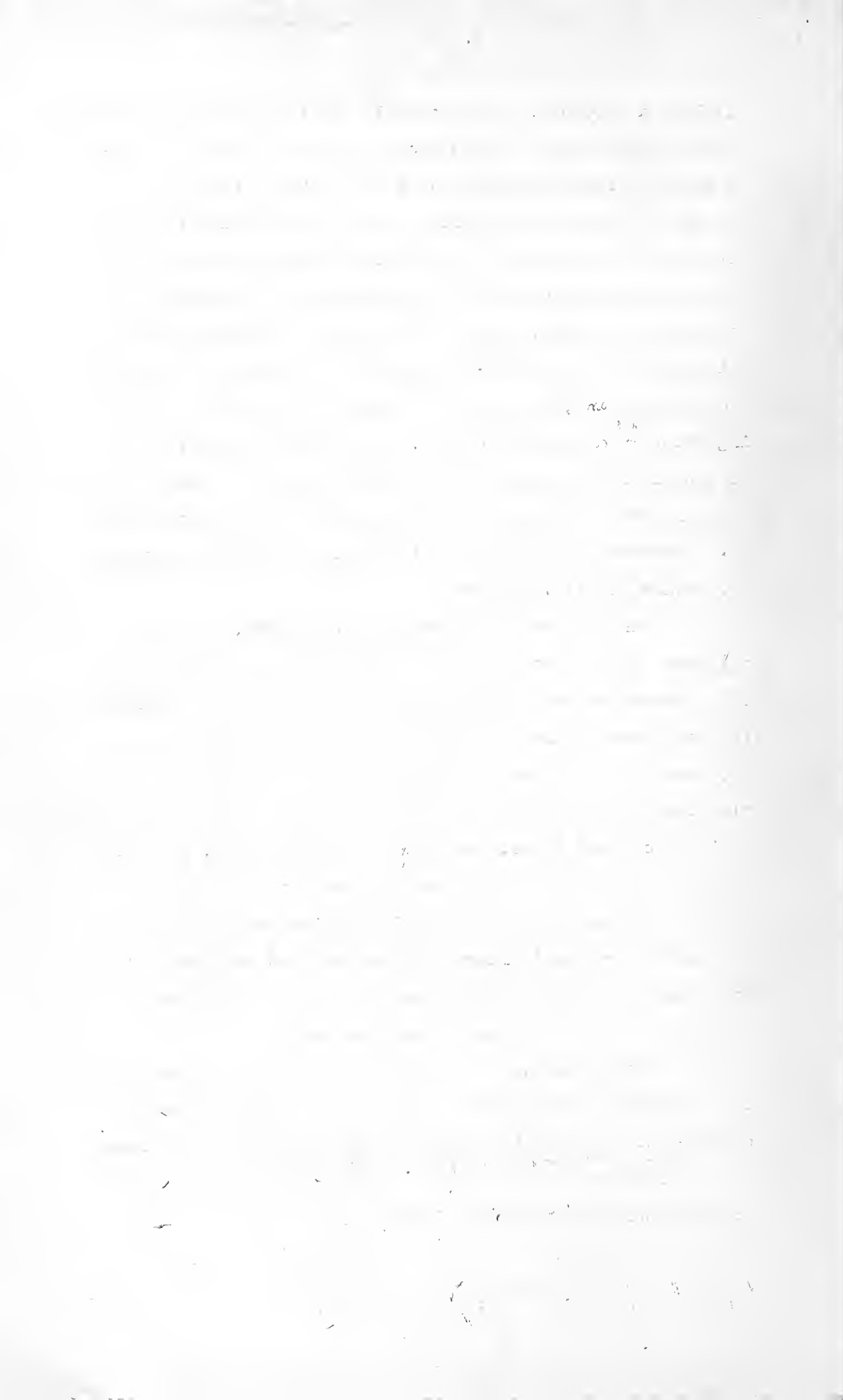
involves a freehold, and an appeal from the same lies directly to the Supreme Court. The above case was a suit by a husband to set aside a deed made by him to his wife upon the ground of fraud and conspiracy. The bill alleging that the wife secured the property by means of fraud and conspiracy upon her promise to marry the complainant. In *Lehmann vs. Rothbarth*, 111, Ill., 185, it is stated, "Where one of the main objects in a bill ^{is} ~~is~~ ⁱⁿ chancery is to obtain an equitable freehold in land, or, in other words, to establish a resulting trust ⁱⁿ a freehold estate, a freehold is involved, and an appeal lies directly to the Supreme Court." *Chapman vs. Northern Trust Company*, 294 Ill., 383; *Banking Association vs. Commercial National Bank*, 157 Ill., at page 578; *Bethman vs. Bowman*, 81 Ill. App. 85.

In the case of *Lindquist vs. Iverson*, 333, Ill. at page 523, the Court held: "A freehold is involved in all cases where the necessary result of the judgment or decree is that one party gains and another loses a freehold estate; or, where the title to a freehold is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue, even though the judgment, or decree did not result in one party gaining and another losing a freehold estate." We are of the opinion that a freehold is involved in the decision of this case and the Appellate Court does not have jurisdiction to decide it. An appeal should have been taken to the Supreme Court.

It is hereby ordered that this case be transferred to the Supreme Court of this State and the Clerk is hereby ordered and directed to transmit the transcript of all files herein with the order of this transfer to the Clerk of the Supreme Court of the State of Illinois.

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Not to be reported



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